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In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT B. REICH, SECRETARY OF LABOR, PETITIONER

v.

CONTINENTAL CASUALTY COMPANY
AND
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, MEMBERS OF THE CNA INSURANCE COMPANIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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49 pp

QUESTION PRESENTED

Whether Section 502(a)(5) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(5), authorizes a cause of action by the Secretary of Labor for equitable relief against a nonfiduciary who knowingly participates with a plan fiduciary in a violation of fiduciary duties under the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Reasons for granting the petition	9
Conclusion	24
Appendix A	1a
Appendix B	9a
Appendix C	15a

TABLE OF AUTHORITIES

Cases:

Airparts Co. v. *Custom Benefit Servs. of Austin, Inc.*, 828 F. Supp. 870 (D. Kan. 1993), rev'd, 28 F.3d 1062 (10th Cir. 1994)	12
Amoco Prod. Co. v. *Village of Gambell*, 480 U.S. 531 (1987)	15
Arakelian v. *National Western Life Ins. Co.*, 755 F. Supp. 1080 (D.D.C. 1990)	10
Arakelian v. *National Western Life Ins. Co.*, 755 F. Supp. 1086 (D.D.C. 1990)	10
Blevins Screw Prods., Inc. v. *Prudential Bache Sec., Inc.*, 835 F. Supp. 984 (E.D. Mich. 1993)	12, 13
Brock v. *Gerace*, 635 F. Supp. 563 (D.N.J. 1986)	4, 10
Brock v. *Hendershott*, 840 F.2d 339 (6th Cir. 1988)	11
Brock v. *Lindemann*, 689 F. Supp. 678 (N.D. Tex. 1987), rev'd, 853 F.2d 1307 (5th Cir. 1988)	10
Brown v. *Gardner*, No. 93-1128 (Dec. 12, 1994)	17
Casper Air Service v. *Sun Life Assurance Co.*, 752 F. Supp. 1005 (D. Wyo. 1990)	10
Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994)	10
Central States, Southeast & Southwest Areas Pension Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985)	14

Cases—Continued: Page

Department of Revenue of Oregon v. *ACF Indus., Inc.*, 114 S. Ct. 843 (1994) 17-18
Diduck v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992) 11
District of Columbia v. *Greater Washington Bd. of Trade*, 113 S. Ct. 580 (1992) 21
Dole v. *Compton*, 753 F. Supp. 563 (E.D. Pa. 1990) ... 9, 20
Donovan v. *Bryans*, 566 F. Supp. 1258 (E.D. Pa. 1983) 10, 20
Donovan v. *Daugherty*, 550 F. Supp. 390 (S.D. Ala. 1982) 10, 20
Donovan v. *Schmoutey*, 592 F. Supp. 1361 (D. Nev. 1984) 10
Donovan v. *Unicorn Group*, 3 Employee Benefits Cas. (BNA) 1665 (S.D.N.Y. 1982) 10
Estate of Cowart v. *Nicklos Drilling Co.*, 112 S. Ct. 2589 (1992) 17
Fink v. *National Sav. & Trust Co.*, 772 F.2d 951 (D.C. Cir. 1985) 11
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989) 14, 19, 21
Foltz v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143 (D.D.C. 1986) 10
Framingham Union Hosp., Inc. v. *Travelers Ins. Co.*, 721 F. Supp. 1478 (D. Mass. 1989) 10, 22
Framingham Union Hosp., Inc. v. *Travelers Ins. Co.*, 744 F. Supp. 29 (D. Mass. 1990) 9-10
Freund v. *Marshall & Ilsley Bank*, 485 F. Supp. 629 (W.D. Wis. 1979) 10
Gruby v. *Brady*, 838 F. Supp. 820 (S.D.N.Y. 1993) 12
Grun v. *Pneumo Abex Corp.*, 808 F. Supp. 632 (N.D. Ill. 1992) 10
Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 15
Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990) .. 22
Kuper v. *Quantum Chemical Corp.*, 838 F. Supp. 342 (S.D. Ohio 1993) 12

Cases—Continued: Page

Kwatcher v. *Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957 (1st Cir. 1989) 23
Lowen v. *Tower Asset Management, Inc.*, 829 F.2d 1209 (2d Cir. 1987) 20
Martin v. *Lundberg*, 13 Employee Benefits Cas. (BNA) 1713 (N.D. Tex. 1991), aff'd in part, 18 F.3d 935 (5th Cir. 1994) 9
McDougall v. *Donovan*, 539 F. Supp. 596 (N.D. Ill. 1982)..... 10
McLaughlin v. *Bendersky*, 705 F. Supp. 417 (N.D. Ill. 1989) 10
McLaughlin v. *Compton*, 834 F. Supp. 743 (E.D. Pa. 1993), appeal pending, No. 93-2019 (3d Cir.) 12, 13
McManus v. *Gitano Group, Inc.*, 851 F. Supp. 79 (E.D.N.Y. 1994) 12
Mertens v. *Hewitt Associates*:
948 F.2d 607 (9th Cir. 1991), aff'd, 113 S. Ct. 2063 (1993) 11
113 S. Ct. 2063 (1993) 2, 6, 7, 9-10, 15, 17, 20, 22
Mitchell v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 20
New York State Teamsters Council Health & Hosp. Fund v. *Estate of DePerno*, 816 F. Supp. 138 (N.D.N.Y. 1993), aff'd in part, 18 F.3d 179 (2d Cir. 1994) 10
Nieto v. *Ecker*, 845 F.2d 868 (9th Cir. 1988) 11, 18
Pension Fund—Mid Jersey Trucking Industry—Local 701 v. *Omni Funding Group*, 731 F. Supp. 161 (D.N.J. 1990) 10
Pilot Life Ins. Co. v. *Dedeaux*, 481 U.S. 41 (1987) 22, 23
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) . 14, 15, 20
Reich v. *Davidson Lumber Sales, Inc., Employees Retirement Plan*, Nos. 90-C-716W and 91-C-870J (D. Utah Dec. 22, 1993) 12
Reich v. *Rowe*, 20 F.3d 25 (1st Cir. 1994) 12
Safe Deposit & Trust Co. v. *Cahn*, 62 A. 819 (Md. 1906) 19

Cases—Continued: Page

Secretary of Labor v. *Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) 22
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983) 21, 23
Shofer v. *Stuart Hack Co.*, 595 A.2d 1078 (Md. 1991), cert. denied, 112 S. Ct. 1174 (1992) 22
Strauss v. *United States Fidelity & Guaranty Co.*, 63 F.2d 174 (4th Cir.), cert. denied, 289 U.S. 747 (1933) 19
Thornton v. *Evans*, 692 F.2d 1064 (7th Cir. 1982) 8, 11, 20
UIU Severance Pay Trust Fund v. *Local Union No. 18-U, United Steelworkers*, 998 F.2d 509 (7th Cir. 1993) 23
Useden v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. denied, 113 S. Ct. 2927 (1993) 11, 13
Weinberger v. *Romero-Barcelo*, 456 U.S. 305 (1982) 15
Weir v. *Northwestern National Life Ins. Co.*, 796 F. Supp. 846 (E.D. Pa. 1992) 10
Whitfield v. *Lindemann*, 853 F.2d 1298 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989) 11

Statutes and regulation:

Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* 2
§ 2, 29 U.S.C. 1001 20
§ 3(9), 29 U.S.C. 1002(9) 17
§ 3(14), 29 U.S.C. 1002(14) 11
§ 3(21), 29 U.S.C. 1002(21) 17
§ 3(21)(A)(i), 29 U.S.C. 1002(21)(A)(i) 21
Pt. 4 ..... 2, 17, 18
§§ 401-414, 29 U.S.C. 1101-1114 (1988 & Supp. V 1993) 2, 17
§ 404, 29 U.S.C. 1104 (1988 & Supp. V 1993) 18
§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A) 6
§ 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B) 6
§ 405(a), 29 U.S.C. 1105(a) 2, 15a
§ 405(a)(1), 29 U.S.C. 1105(a)(1) 17, 15a
§ 406(b)(1), 29 U.S.C. 1106(b)(1) 6

Statutes and regulation—Continued: Page

§ 409(a), 29 U.S.C. 1109(a) 2, 16a
§ 410(a), 29 U.S.C. 1110(a) 5
Pt. 5:
§ 502(a), 29 U.S.C. 1132(a) (1988 & Supp. V 1993)..... 2, 10, 16a
§ 502(a)(2), 29 U.S.C. 1132(a)(2) 5, 16, 16a
§ 502(a)(3), 29 U.S.C. 1132(a)(3) 2, 3, 6, 8, 10, 11, 16, 23, 17a
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§ 502(*l*), 29 U.S.C. 1132(*l*) (Supp. V 1993) 16, 18a
§ 502(*l*)(1), 29 U.S.C. 1132(*l*)(1) (Supp. V 1993) ... 2, 16, 18a
§ 502(*l*)(1)(A), 29 U.S.C. 1132(*l*)(1)(A) (Supp. V 1993) 17, 18a
§ 502(*l*)(1)(B), 29 U.S.C. 1132(*l*)(1)(B) (Supp. V 1993) 17, 18a
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§ 514(a), 29 U.S.C. 1144(a) 21
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29 C.F.R. 2509.75-4 5

Miscellaneous:

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Restatement of Restitution (1937) 8, 19
2 Restatement (Second) of Trusts (1959) 15, 19
S. Rep. No. 127, 93d Cong., 1st Sess. (1973) 21
S. Rep. No. 383, 93d Cong., 1st Sess. (1973) 19
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Vol. 3 (4th ed. 1988) 15
Vol. 4 (4th ed. 1989) 15, 19
The Random House Dictionary of the English Language (2d ed. 1987) 13
Webster's Third New International Dictionary (1986) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 33 F.3d 754. The opinion of the district court (App., *infra*, 9a-14a) is reported at 17 Employee Benefits Cas. (BNA) 1099.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1994. On November 14, 1994, Justice Stevens

extended the time within which to file a petition for a writ of certiorari to and including December 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1105(a), 1109(a), 1132(a), and 1132(*l*)(1) and (2), are reproduced at App., *infra*, 15a-18a.

STATEMENT

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, is the comprehensive federal statute that governs employee benefit plans. The provisions of ERISA relating to fiduciary responsibility are set forth in Part 4 of the Act, 29 U.S.C. 1101-1114 (1988 & Supp. V 1993). The civil enforcement provision of ERISA, Section 502(a), authorizes plan participants, beneficiaries, fiduciaries, and the Secretary of Labor to bring various causes of action. 29 U.S.C. 1132(a) (1988 & Supp. V 1993). In particular, Section 502(a)(5) of ERISA authorizes the Secretary of Labor to bring an action—

> (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.

29 U.S.C. 1132(a)(5). In *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), a case involving claims against a nonfiduciary for knowing participation in a fiduciary breach, this Court held that the authorization of "equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3) (the private party analog to Section

502(a)(5)) does not permit an award of compensatory damages. This case raises a logically prior, and more fundamental, issue that was discussed but left open in *Mertens*: Whether the cause of action created under Section 502(a)(3) (and thus under Section 502(a)(5) as well) authorizes a suit for equitable relief against a nonfiduciary who knowingly participates in a fiduciary breach.

1. This case arises from the purchase of fiduciary liability insurance by 21 individual trustees of the Hotel Employees and Restaurant Employees International Union Pension Plan and the Hotel Employees and Restaurant Employees International Union Welfare Plan (Plans) from Continental Casualty Company and American Casualty Company of Reading, Pennsylvania, Members of the CNA Insurance Companies (CNA). Compl. ¶¶ 1, 4, 6 (A. 9, 10).[1] In October 1984, the Plans renewed a fiduciary liability insurance policy from CNA that had been in effect since 1974. Compl. ¶ 7 (A. 11); Stip. ¶¶ 7-8 (A. 37). The new policy, which covered claims made during the period from October 18, 1984, to October 18, 1987, provided $5 million for indemnity coverage and $5 million for defense costs per year. The Plans paid a total premium of $92,070 for the three-year policy. Compl. ¶ 7 (A. 11); Stip. ¶ 10 (A. 37-38).

In September 1985, CNA notified the Plans that it was cancelling the policy, effective October 17, 1985. Compl.

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[1] As discussed below, during an adjournment in the trial, the district court dismissed the Secretary's action against CNA for failure to state a claim upon which relief can be granted, in light of this Court's intervening decision in *Mertens*. App., *infra*, 9a-14a. Inasmuch as the court made no findings of fact, the references herein are to various documents in the record. "A." and "S.A." refer to the Appendix and Supplemental Appendix filed in the court of appeals.

¶ 8 (A. 11); Stip. ¶ 14 (A. 39). The cancellation followed shortly after the presentation to CNA of a claim for defense costs in *Brock* v. *Gerace*, 635 F. Supp. 563 (D.N.J. 1986), an ERISA action brought by the Secretary against the Welfare Plan trustees and others. Stip. ¶¶ 12-13 (A. 38-39). In response to CNA's cancellation of the policy, the trustees caused the Plans to exercise an option that, upon payment of a premium of $7531, extended the policy period for claims filed against the Plans and trustees for one year beyond the October 17, 1985, cancellation date. Compl. ¶ 9 (A. 11); Stip. ¶¶ 15-16 (A. 39-40). That extension applied, however, only to claims based on wrongful acts committed by the trustees before the cancellation date. *Ibid.*

At the same time, the trustees brought suit in state court against CNA for its cancellation of the 1984-1987 policy. They obtained a temporary restraining order blocking its cancellation. Stip. ¶¶ 17-18 (A. 40-41); *Hanley* v. *Continental Assurance Co.*, No. 85-CH-12468. In March 1986, CNA issued Endorsement 7 (erroneously referred to in the complaint as Endorsement 8) in settlement of that suit, rescinded the one-year extension, and refunded the $7531 premium that the Plans had paid for the extension. Stip. ¶¶ 22-25 (A. 42-44). Endorsement 7, which is the focus of the instant case, replaced the previous one-year policy extension with a policy covering claims made from October 18, 1985, to October 18, 1987—the remaining two-year period covered by the cancelled contract—for a premium of $970,000. Compl. ¶ 10 (A. 11-12); Stip. ¶¶ 22, 25 (A. 42-43, 44).

On its face, Endorsement 7 provided $2 million in coverage for combined indemnity and defense costs, but the $2 million limit was to be reduced dollar for dollar, by up to $1 million, for claims to be paid by CNA as a result of the litigation in *Brock* v. *Gerace*, *supra*. Stip. ¶ 22 (A.

42-43). The Secretary intended to prove at trial that, well before March 1986, CNA knew, and the trustees upon proper inquiry should have known, that the costs relating to the *Gerace* litigation would exceed $1 million, so that the coverage provided under Endorsement 7 would amount to no more than $1 million.[2] Thus, the Plans paid $970,000 for $1 million worth of insurance, to cover the two-year time period for which it had initially received $20 million worth of insurance ($5 million indemnity and $5 million defense costs per year) at a two-year premium cost of $61,380.[3]

2. The Secretary brought suit in the United States District Court for the Northern District of Illinois against the trustees and CNA, under Section 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (5). The Secretary alleged that the payment of a $970,000 premium for $1 million of insurance coverage violated ERISA's fiduciary duty provisions. More particularly, the Secretary alleged that, by paying nearly one dollar in premium for each dollar of coverage, the Plans essentially self-funded the risk of loss from fiduciary breaches, in violation of ERISA's prohibition against a plan's indemnification of fiduciaries for violations of their fiduciary duties. 29 U.S.C. 1110(a); 29 C.F.R. 2509.75-4. Further, the Secretary maintained that because Endorsement 7, at great cost to the Plans, provided no net protection to the Plans and instead

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[2] CNA argued below that defense costs in *Gerace* amounted to $300,000 at the time Endorsement 7 was agreed to, and that CNA's total costs in connection with the *Gerace* litigation were at that time uncertain. CNA C.A. Br. 10.

[3] Before agreeing to Endorsement 7, the trustees were unable to obtain similar insurance from any insurer besides CNA. A. 50; see S.A. 16.

served only the interests of the trustees, the trustees acted imprudently and disloyally by renewing the policy, in violation of Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A) and (B), and in their own interests and to the detriment of the Plans, in violation of Section 406(b)(1) of ERISA, 29 U.S.C. 1106(b)(1). Compl. ¶¶ 11-12 (A. 12). The Secretary alleged that CNA knowingly and actively participated in the trustees' breach of their fiduciary duties by selling Endorsement 7 to the Plans "for its own undue enrichment, as a result of both the excessive premium it charged and its avoid[a]nce of the increased exposure to loss" that CNA would otherwise have experienced under the initial one-year policy extension. Compl. ¶ 13 (A. 12-13).

As relief, the Secretary sought rescission of Endorsement 7, an order making the defendants jointly and severally liable for the losses suffered by the Plans as a result of the fiduciary breaches, disgorgement by CNA of all payments it had received (plus interest) as a result of the breaches, an injunction against future breaches, and other just and equitable relief. Compl., Prayer for Relief ¶¶ 1, 3-4, 7 (A. 13, 14). The trustees settled the claims against them, and the case proceeded to trial solely against CNA on the knowing participation claim.

During a lengthy adjournment in the Secretary's case in chief, this Court issued its opinion in *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993); see App., *infra*, 9a-10a. In *Mertens*, before deciding that Section 502(a)(3) of ERISA does not authorize an award of compensatory damages, the Court noted that it was "unclear" whether Section 502(a)(3) authorizes any relief at all against a nonfiduciary who knowingly participates in a breach of

fiduciary duty. 113 S. Ct. at 2067.[4] Because the respondent in *Mertens* disclaimed reliance on that preliminary point, however, the Court expressly "reserve[d] decision" on the question whether "a remedial wrong ha[d] been alleged." *Id.* at 2067-2068.

In light of the actual holding in *Mertens*, the Secretary abandoned his request in this case that CNA be held jointly and severally liable in damages for the losses suffered by the Plans, and thereafter sought only an order requiring CNA to disgorge the financial benefit it had gained as a result of the trustees' breaches. The Secretary alleged that CNA was unjustly enriched by $818,107, the amount by which Endorsement 7 reduced the loss that CNA would otherwise have sustained.[5]

3. The district court dismissed the Secretary's claims for equitable relief. App., *infra*, 9a-14a. It acknowledged that the discussion in *Mertens* questioning the availability of equitable relief against nonfiduciaries

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[4] The four dissenting Justices, on the other hand, found "no basis for doubting the validity of petitioners' cause of action." 113 S. Ct. at 2073 n.1.

[5] CNA asserts that it lost $220,676 on Endorsement 7 due to a May 1986 claim it paid. S.A. 22. The Secretary accepts the $220,676 loss figure, but contends that CNA would have suffered a far greater loss of $1,038,783 under the initial one-year extension. *Ibid.* The Secretary's allegation of the far greater loss is based on the respective premiums ($970,000 versus $7531), interest earned, various expenses, and the amount of the claim paid. *Ibid.* The $818,107 in unjust enrichment represents the difference between the two loss figures. *Id.* at 22-24; A. 254. CNA disputes the validity of the Secretary's calculation, contending that the May 1986 claim related both to pre-1985 conduct and post-1985 conduct, and that Endorsement 7 (which, unlike the original one-year extension, covered claims based on post-1985 wrongful acts) increased the Plans' coverage (and CNA's liability) with respect to that claim. CNA C.A. Br. 10-12.

was dictum and that *Mertens*' holding barring monetary damages was not determinative of this case. *Id.* at 10a. It also acknowledged that pre-*Mertens* Seventh Circuit precedent recognized the existence of a cause of action under ERISA against nonfiduciaries. *Ibid.* (citing *Thornton* v. *Evans*, 692 F.2d 1064 (7th Cir. 1982)). The court predicted, however, that the court of appeals would follow the *Mertens* dictum, given the "Supreme Court's relatively extended and careful statement of its views on the subject." *Id.* at 13a. On that basis, it held that ERISA did not afford the Secretary a cause of action against CNA.

4. The court of appeals affirmed. App., *infra*, 1a-8a. As an initial matter, the court agreed with the Secretary that restitution is the kind of "*distinctively* equitable relief" that *Mertens* found authorized by Section 502(a)(3) of ERISA (and thus by Section 502(a)(5) as well), because it "is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though *occasionally* awarded in equity cases, are not." App., *infra*, 4a, 5a. The court further agreed that the relief sought by the Secretary in this case for "the unjust avoidance of a loss" is properly viewed as a claim for restitution. *Id.* at 5a-6a.[6]

Turning to the question whether ERISA authorizes equitable relief against nonfiduciaries, the court noted that the discussion in *Mertens* respecting the issue was dictum that it was not bound to follow; that the view espoused by this Court reflected a construction of Section 502(a)(5) that the Seventh Circuit "might not embrace as an original matter"; and that it was

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[6] See Restatement of Restitution § 1 cmt. b, at 12 (1937) (a person "confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss").

"impressed" by the Secretary's argument that, absent the availability of relief under ERISA against nonfiduciary knowing participants, the Act's preemption of traditional state law causes of action would often leave plans without any effective remedy for fiduciary misconduct. App., *infra*, 3a, 6a-7a. The court stated, however, that "[i]n areas of profound uncertainty," considered Supreme Court dictum "provides the best, though not an infallible, guide to what the law is." *Id.* at 7a-8a. Solely on that ground it held that Section 502(a)(5) precludes remedies against nonfiduciaries. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), does not authorize an action for equitable relief against a nonfiduciary who knowingly participates in a trustee's violation of the fiduciary duties imposed by the Act. The text of Section 502(a)(5) authorizes suit for "appropriate equitable relief" to "redress" fiduciary violations. Nothing in that text, or in the structure or history of the Act, suggests that, in providing such relief, the courts are precluded from exercising their longstanding authority to order restitution against a third party who has profited from his knowing participation in a breach of fiduciary duties.

The Secretary's authority to obtain equitable relief against nonfiduciaries is of substantial importance to his ability to enforce the Act's fiduciary standards and protect the interests of covered employees and their beneficiaries.[7] Although the Court in *Mertens* v. *Hewitt*

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[7] See, *e.g.*, *Martin* v. *Lundberg*, 13 Employee Benefits Cas. (BNA) 1713, 1716 (N.D. Tex. 1991), aff'd in part, 18 F.3d 935 (5th Cir. 1994) (Table); *Dole* v. *Compton*, 753 F. Supp. 563, 568-569 (E.D. Pa. 1990); *Framingham Union Hosp., Inc.* v. *Travelers Ins.*

Associates, 113 S. Ct. 2063 (1993), expressly reserved judgment regarding the viability of a cause of action under Section 502(a) against nonfiduciaries,[8] the majority's discussion of the issue has been treated by many lower courts as equivalent to a holding, creating

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Co., 744 F. Supp. 29, 33 (D. Mass. 1990); *McLaughlin* v. *Bendersky*, 705 F. Supp. 417, 421 (N.D. Ill. 1989); *Brock* v. *Lindemann*, 689 F. Supp. 678, 682 (N.D. Tex. 1987), rev'd on other grounds, 853 F.2d 1307 (5th Cir. 1988); *Brock* v. *Gerace*, 635 F. Supp. 563, 569 (D.N.J. 1986); *Donovan* v. *Schmoutey*, 592 F. Supp. 1361, 1395-1396, 1399, 1401, 1405 (D. Nev. 1984); *Dovovan* v. *Bryans*, 566 F. Supp. 1258, 1266-1267, 1269 (E.D. Pa. 1983); *Donovan* v. *Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Donovan* v. *Unicorn Group*, 3 Employee Benefits Cas. (BNA) 1665, 1666-1667 (S.D.N.Y. 1982); *McDougall* v. *Donovan*, 539 F. Supp. 596, 598-599 & nn.4-5 (N.D. Ill. 1982); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-642 (W.D. Wis. 1979).

The cause of action against nonfiduciary knowing participants has also been an important component of enforcement by private parties under Section 502(a)(3). See, *e.g.*, *New York State Teamsters Council Health & Hosp. Fund* v. *Estate of DePerno*, 816 F. Supp. 138, 148-149 (N.D.N.Y. 1993), aff'd in part, 18 F.3d 179 (2d Cir. 1994); *Grun* v. *Pneumo Abex Corp.*, 808 F. Supp. 632, 636-637 (N.D. Ill. 1992); *Weir* v. *Northwestern National Life Ins. Co.*, 796 F. Supp. 846, 848 (E.D. Pa. 1992); *Arakelian* v. *National Western Life Ins. Co.*, 755 F. Supp. 1086, 1089 (D.D.C. 1990); *Arakelian* v. *National Western Life Ins. Co.*, 755 F. Supp. 1080, 1085-1086 (D.D.C. 1990) (aiding and abetting); *Casper Air Service* v. *Sun Life Assurance Co.*, 752 F. Supp. 1005, 1009-1010 (D. Wyo. 1990); *Pension Fund—Mid Jersey Trucking Industry—Local 701* v. *Omni Funding Group*, 731 F. Supp. 161, 178 (D.N.J. 1990); *Framingham Union Hosp., Inc.* v. *Travelers Ins. Co.*, 721 F. Supp. 1478, 1488-1489 (D. Mass. 1989); *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1168 (D.D.C. 1986).

[8] The Court's comments regarding *Mertens* in *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1447 (1994), cannot be read, therefore, to suggest that the Court definitively rejected the availability of a cause of action against nonfiduciaries.

confusion in the lower courts respecting the validity of pre-*Mertens* precedents on the question. Because the issue is important and frequently recurring—and because the Court expressly declined to resolve it in *Mertens*—the question whether ERISA authorizes suit against nonfiduciary knowing participants warrants resolution by this Court.

1. Before *Mertens*, every court of appeals that addressed the issue held that Section 502(a)(3) and (5) authorizes equitable relief against nonfiduciaries who knowingly participate in a violation of the Act's fiduciary requirements. See *Diduck* v. *Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 279-281 (2d Cir. 1992); *Whitfield* v. *Lindemann*, 853 F.2d 1298, 1303 (5th Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Thornton* v. *Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982); see also *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985) (dicta).[9] Since *Mertens*, however, the trend, as exemplified most recently by this case, is

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[9] Although the Ninth Circuit stated in *Nieto* v. *Ecker*, 845 F.2d 868, 873-874 & n.7 (1988), that Section 502(a)(3) permits equitable relief only against nonfiduciaries who are "parties in interest" (as defined by Section 3(14) of ERISA, 29 U.S.C. 1002(14)), it assumed, without deciding, in *Mertens* v. *Hewitt Associates*, 948 F.2d 607, 612 (1991), aff'd, 113 S. Ct. 2063 (1993), that Section 502(a)(3) may authorize restitutionary relief more generally in cases of unjust enrichment. Similarly, the Eleventh Circuit, in *Useden* v. *Acker*, 947 F.2d 1563 (1991), cert. denied, 113 S. Ct. 2927 (1993), rejected the availability of money damages against a nonfiduciary, but suggested that Section 502(a)(3) and (5) may afford a cause of action against nonfiduciaries for equitable relief. *Id.* at 1580-1581 ("ERISA sections 502(a)(3) and 502(a)(5) authorize suits to enjoin or obtain other equitable relief for '*any act or practice*' violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued.").

against permitting equitable relief against a non-fiduciary knowing participant. See *Reich* v. *Rowe*, 20 F.3d 25, 26 (1st Cir. 1994); *Blevins Screw Prods., Inc.* v. *Prudential Bache Sec., Inc.*, 835 F. Supp. 984, 986 (E.D. Mich. 1993) (*Hendershott* no longer good law); *McLaughlin* v. *Compton*, 834 F. Supp. 743, 752 n.7 (E.D. Pa. 1993), appeal pending, No. 93-2019 (3d Cir.); *Reich* v. *Davidson Lumber Sales, Inc., Employees Retirement Plan*, Nos. 90-C-716W and 91-C-870J (D. Utah Dec. 22, 1993); but see *Airparts Co.* v. *Custom Benefit Servs. of Austin, Inc.*, 828 F. Supp. 870, 876-877 (D. Kan. 1993), rev'd on other grounds, 28 F.3d 1062 (10th Cir. 1994) (adhering to *Hendershott*); *Gruby* v. *Brady*, 838 F. Supp. 820, 834 n.15 (S.D.N.Y. 1993) (adhering to *Diduck*). Other courts have noted, without resolving, the tension between their Circuit's precedents and the *Mertens* dictum. *E.g.*, *McManus* v. *Gitano Group, Inc.*, 851 F. Supp. 79, 82-83 (E.D.N.Y. 1994) (questioning whether *Diduck* remains good law); *Kuper* v. *Quantum Chemical Corp.*, 838 F. Supp. 342, 347 n.1 (S.D. Ohio 1993) (questioning whether *Hendershott* remains good law).

If the lower courts were merely reevaluating their precedents in light of this Court's actual holding in *Mertens*, or in light of the reasoning underlying that holding, it might be appropriate to postpone review to permit the issue to percolate further in the courts of appeals. But as the opinions of the lower courts make clear, the decisions rejecting the availability of even distinctly equitable relief against participating nonfiduciaries were sparked not by this Court's holding on compensatory damages, but instead by its dictum respecting the distinct threshold issue whether a cause of action exists at all—an issue that was not fully briefed or argued by the parties and that the Court expressly left open. Moreover, in most cases, the courts have not

merely taken the views expressed in *Mertens* into account in conducting their own independent analyses, but have instead treated the Court's tentative discussion as though it were a holding precluding the application of equitable remedies to nonfiduciaries. See, *e.g.*, App., *infra*, 7a (Seventh Circuit expressing its unwillingness to "buck the dictum"); *McLaughlin* v. *Compton*, 834 F. Supp. at 746 (*Mertens* "compels" judgment against Secretary); *Blevins Screw Prods.*, 835 F. Supp. at 986 (*Mertens* "*determined* that ERISA does not authorize suit against a nonfiduciary for knowing participation") (emphasis added).

2. The court of appeals' holding that ERISA does not authorize suits for equitable relief against nonfiduciaries is incorrect. Section 502(a)(5) of ERISA states that the Secretary of Labor may bring an action "to enjoin any act or practice" that violates the fiduciary requirements set forth in Part 4 of the Act, or "to obtain other appropriate equitable relief * * * to redress such violation." 29 U.S.C. 1132(a)(5). The term "redress" means "the setting right of what is wrong." *The Random House Dictionary of the English Language* 1617 (2d ed. 1987); *Webster's Third New International Dictionary* 1904 (1986). Nothing in the language of Section 502(a)(5), or in the structure, history, or purposes of the Act, limits the type of "equitable relief" that may be granted or "the types of parties who may be * * * sued," *Useden* v. *Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), cert. denied, 113 S. Ct. 2927 (1993), to "set right" the wrongs that are committed against plans through violations of the Act.

a. As this Court has noted, many provisions of ERISA are phrased in expansive, general terms, consistent with Congress's intention and expectation that the courts would, in fleshing out the meaning of those terms,

"develop a 'federal common law of rights and obligations'" under the Act. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989). Recognizing that "ERISA abounds with the language and terminology of trust law," *ibid.*, this Court has looked to the background of the common law, and particularly to its established trust principles, in deriving that federal common law and filling in the interstices of the Act. See, *e.g.*, *id.* at 111-115; *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 570 (1985). Here, Section 502(a)(5)'s use of the phrase "appropriate equitable relief" is naturally understood as referring to the common law for further definition of the cause of action it creates. That reference in turn points the way to the proper resolution of this case, because under the law of trusts "equitable relief" has traditionally encompassed suits for restitution and other equitable remedies against a nonfiduciary who knowingly participates in a trustee's breach of fiduciary duties.

In *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946), this Court emphasized the breadth of a court's general equitable authority:

> It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances.

> Only in that way can equity do complete rather than truncated justice.

There can be no question that the courts' equitable powers, as described in *Porter*, are sufficiently broad to permit relief against nonfiduciary knowing participants. As the Court readily acknowledged in *Mertens*, "'knowing participation' liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts." 113 S. Ct. at 2067, citing 3 A. Scott & W. Fratcher, *The Law of Trusts* § 224.1, at 404 (4th ed. 1988); see also 4 *id.* § 326, at 291 (4th ed. 1989); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 901, at 257 (rev. 2d ed. 1982); 2 Restatement (Second) of Trusts § 326, at 124 (1959); A. Scott, *Participation in a Breach of Trust*, 34 Harv. L. Rev. 454, 454 (1921).

This Court has counseled that Congress will be understood not to have departed from traditional principles of equity unless it has made plain its desire to do so. *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-330 (1944); see also *Porter*, 328 U.S. at 398 ("Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."); *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) ("[W]e do not lightly assume that Congress has intended to depart from established [equitable] principles."); *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987) (same). Given the acknowledged and longstanding cause of action in equity against nonfiduciary knowing participants, Section 502(a)(5) of ERISA cannot, without a clear statutory disclaimer, be read to exclude nonfiduciaries from the scope of the Secretary's enforcement powers. As the dissent in *Mertens* noted, 113 S. Ct. at 3073 n.1,

the text of Section 502(a)(3) (which is directly parallel to that of Section 502(a)(5)) contains no such disclaimer.

Significantly, the only other section of ERISA that speaks to the issue, Section 502(*l*), 29 U.S.C. 1132(*l*) (Supp. V 1993), provides strong support for reading Section 502(a)(5) to permit relief against nonfiduciaries. Section 502(*l*)(1) provides:

> In the case of —
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or
>
> (B) *any knowing participation in such a breach or violation by any other person,*
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of *the applicable recovery amount.*

29 U.S.C. 1132(*l*)(1) (Supp. V 1993) (emphasis added). Section 502(*l*)(2)(B) defines "applicable recovery amount" to include "any amount * * * ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries in a judicial proceeding" initiated by the Secretary under Section 502(a)(2) or (5) of ERISA. 29 U.S.C. 1132(*l*)(2)(B) (Supp. V 1993) (emphasis added). The most natural reading of those provisions, which refer specifically to amounts recovered by the Secretary in judicial proceedings under Section 502(a)(5) against persons "other" than fiduciaries, is that Congress understood that ERISA makes such relief available against a nonfiduciary who participates in a fiduciary breach, and that Section 502(*l*) was intended to build upon that practice.

The Court in *Mertens* suggested that "other person" in Section 502(*l*)(1)(B) might refer only to cofiduciaries, who are liable for knowingly participating in a breach by another fiduciary. 113 S. Ct. at 2070-2071. See 29 U.S.C. 1105(a)(1). That interpretation, however, is not a natural reading of the provision; nor is it in harmony with the overall structure of the Act. If Congress had intended to refer only to cofiduciaries, it is unlikely that it would have used the phrase "other person." Both "person" and "fiduciary" are defined terms under the Act. Compare 29 U.S.C. 1002(9) ("person") with 29 U.S.C. 1002(21) ("fiduciary"). The terms are not interchangeable. When Congress used the far less restrictive term "person," it must be presumed to have done so intentionally, and to have used that term in a manner consonant with its meaning elsewhere in the Act. See *Brown* v. *Gardner*, No. 93-1128 (Dec. 12, 1994), slip. op. 3; *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992).

Moreover, a reading of "other person" to mean only "cofiduciary" is especially unlikely because it would render Section 502(*l*)(1)(B) redundant. Section 502(*l*)(1)(A) authorizes assessment of a civil penalty against any fiduciary who violates his duties under Part 4 of the Act, 29 U.S.C. 1101-1114 (1988 & Supp. V 1993), which expressly includes, under 29 U.S.C. 1105(a)(1), the duty to avoid "participat[ing] knowingly in" a breach by another fiduciary. Because Section 502(*l*)(1)(A) thus already provides the basis for assessing a civil penalty against cofiduciaries who knowingly participate in another fiduciary's breach, interpreting "other person" in Section 502(*l*)(1)(B) to mean only "cofiduciary" would give no independent meaning to Section 502(*l*)(1)(B). "[A] statute should be interpreted so as not to render one part inoperative." *Department of Revenue of Oregon* v. *ACF*

Indus., Inc., 114 S. Ct. 843, 848 (1994) (internal quotation marks omitted).

There would of course be no question about Congress's intention to create a cause of action against nonfiduciary knowing participants if it had imposed on third parties an express duty to avoid knowing participation in fiduciary breaches. Cf. 29 U.S.C. 1104 (1988 & Supp. V 1993) (establishing fiduciaries' duties under ERISA). The absence of an express statutory duty should not be interpreted, however, as an implied limitation on the scope of the equitable cause of action created by Section 502(a)(5). As the Ninth Circuit explained in *Nieto* v. *Ecker*, 845 F.2d 868, 873-874 (1988) (footnote omitted):

> It is true that section 406(a) only prohibits certain transactions by fiduciaries, and does not expressly bar parties in interest from engaging in these transactions. However, section 502(a)(3)'s language expressly grants equitable power to redress violations of ERISA; prohibited transactions plainly fall within this category. Courts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them. In contrast to section 409(a), section 502(a)(3) is not limited to fiduciaries, and there is therefore no reason to exempt parties in interest from this remedial provision when they engage in transactions prohibited by the Act.

That reasoning applies even more strongly in the present context, in which the cause of action is predicated on a third party's *knowing* participation with a fiduciary in a violation of the requirements of Part 4 of the Act.

Moreover, the courts' authority to afford relief against nonfiduciaries at common law was not based on the

nonfiduciary's violation of an independent duty to avoid knowing participation in fiduciary breaches. Instead, the cause of action was typically viewed as arising from the duties imposed by equity on the breaching trustee. See, *e.g.*, *Strauss* v. *United States Fidelity & Guaranty Co.*, 63 F.2d 174, 178 (4th Cir.), cert. denied, 289 U.S. 747 (1933); *Safe Deposit & Trust Co.* v. *Cahn*, 62 A. 819, 822 (Md. 1906); see also, *e.g.*, G. Bogert & G. Bogert, *supra*, § 901, at 257. Restitutionary relief against a nonfiduciary was often accorded under a theory of constructive trust, whereby a third party who knowingly gained possession of trust property as a result of a fiduciary breach was deemed not to possess good title to the property, but rather to hold the property for the benefit of the trust. See Restatement of Restitution, *supra*, §§ 160, 168, at 640, 684; 4 A. Scott & W. Fratcher, *supra*, § 291, at 77; G. Bogert & G. Bogert, *supra*, § 868, at 85; 2 Restatement (Second) of Trusts, *supra*, §§ 290-297, at 56-82 (same).[10]

b. The cause of action created by Section 502(a)(5) should be construed in light of Congress's purpose, through ERISA, "to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone*, 489 U.S. at 113. That principle derives from the general precept that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory

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[10] Congress specifically contemplated that courts would have authority to impose a constructive trust as "appropriate relief" to redress a fiduciary violation. S. Rep. No. 383, 93d Cong., 1st Sess. 105 (1973). There is no indication that Congress intended to limit that authority to actions against breaching fiduciaries.

purposes." *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960); see also *Porter*, 328 U.S. at 398 (where the public interest is involved, courts' equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake").

The central purpose of ERISA to safeguard the interests of plan participants and beneficiaries, see 29 U.S.C. 1001, argues strongly for reading Section 502(a)(5), in a manner consistent with its text, to authorize actions for equitable relief against nonfiduciaries who knowingly participate in fiduciary violations. Third parties can inflict great damage on plans by such participation,[11] and in the absence of authority to seek redress from nonfiduciaries the plans will often not be made whole. Although a cause of action always lies under ERISA against the breaching fiduciary, as a practical matter it may be the nonfiduciary, as in this case, who has profited from the breach and who has the financial resources to provide restitution.[12] It is doubtful that Congress intended to

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[11] See, *e.g.*, *Thornton*, 692 F.2d at 1066-1071 (kickback scheme); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1217 (2d Cir. 1987) (transfer of plan assets to party in interest); *Dole* v. *Compton*, *supra* (obtaining prohibited loans); *Donovan* v. *Bryans*, 566 F. Supp. at 1267 (acceptance by nonfiduciary of plan assets in payment of fiduciary's debt to nonfiduciary); *Donovan* v. *Daugherty*, *supra* (acceptance by nonfiduciaries of plan coverage and benefits to which they were not entitled); see generally G. Bogert & G. Bogert, *supra*, § 901, at 262-264 (listing ways in which third parties can knowingly participate in trustee's breach).

[12] Although ERISA has a broad, functional definition of "fiduciary," see *Mertens*, 113 S. Ct. at 2070-2072, that definition does not include knowing participants in a fiduciary breach who have not themselves exercised discretion regarding management

depart sub silentio from background principles of trust law and prohibit federal courts from granting traditional equitable relief to remedy the unjust enrichment of nonfiduciaries.

If, despite the broad language in Section 502(a)(5) and its clear common law antecedents, a cause of action against nonfiduciaries for knowing participation in a fiduciary breach is determined not to be authorized under the Act, employees and their beneficiaries may, contrary to Congress's intentions, have less protection than before ERISA was enacted, see *Firestone*, 489 U.S. at 114, and nonfiduciaries may be permitted to escape sanctions and keep the fruits of their misdeeds. That is so because ERISA not only incorporates the common law; it displaces the common law on matters relating to plans.[13]

Section 514(a) of ERISA preempts any state laws that "relate to" ERISA covered plans. 29 U.S.C. 1144(a). See also 29 U.S.C. 1144(c)(1) (defining "State law" to include decisional law); *District of Columbia* v. *Greater Washington Bd. of Trade*, 113 S. Ct. 580, 583 (1992) (Section 514(a) preempts any state law that has a connection with or reference to an ERISA plan, even if the law is not specifically designed to affect such plans and is consistent with ERISA's substantive requirements.). Many state law causes of action that would serve to

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of the plan or "any authority or control respecting management or disposition of its assets." 29 U.S.C. 1002(21)(A)(i).

[13] Congress concluded that state laws offered inadequate protection against fiduciary breaches, see S. Rep. No. 127, 93d Cong., 1st Sess. 29-30 (1973); H.R. Rep. No. 533, 93d Cong., 1st Sess. 12-13 (1973), and that employee benefit plans, which were increasingly interstate, should not be subject to multiple and possibly conflicting state regulation. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983) (discussing legislative history).

remedy a nonfiduciary's knowing participation in a fiduciary breach might well be found to "relate to" an ERISA plan, and therefore to be preempted by Section 514(a). See, *e.g.*, *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 140 (1990) (state wrongful discharge action premised on ERISA's anti-retaliation provision preempted); see also *Mertens*, 113 S. Ct. at 2071 (assuming without deciding that state court actions for knowing participation are preempted); *id.* at 2074 n.2 (White, J., dissenting) ("difficult to imagine" how any state common law remedy could have survived ERISA's preemption provision); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 48-52 (1987) (preempting state bad faith insurance claim).[14]

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[14] That is not to say, however, that ERISA preempts all state law claims against nonfiduciaries. See, *e.g.*, *Shofer* v. *Stuart Hack Co.*, 595 A.2d 1078, 1083 (Md. 1991) (state law malpractice action; citing other cases), cert. denied, 112 S. Ct. 1174 (1992); *Framingham Union Hosp.*, 721 F. Supp. at 1489-1490 (same). State law malpractice remedies do not obviate the need for a federal remedy against nonfiduciaries, however, because not all nonfiduciaries owe a professional duty to a plan that would render them answerable to suit in a state malpractice action. Moreover, some actions of professionals may not constitute malpractice even though those actions may give rise to a claim for knowing participation liability. Additionally, there may be questions regarding the capacity of plan participants and beneficiaries, who may sue under ERISA, to bring a state-law suit against nonfiduciaries for participating in the breach of a fiduciary duty owed to their plan under ERISA. Finally, the Secretary, who is responsible for enforcing the provisions of Title I of the Act, would have no authority to bring a suit directly under state law. See *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 690-694 (7th Cir. 1986) (en banc) (noting that Secretary's interest in ERISA action is separate and distinct from that of private plaintiffs).

The necessary corollary to broad preemption, however, is broad protection under ERISA.[15] *UIU Severance Pay Trust Fund* v. *Local Union No. 18-U, United Steelworkers*, 998 F.2d 509, 512 (7th Cir. 1993) (the federal courts' "receptiveness to federal common law notwithstanding the comprehensive character of ERISA is the product of ERISA's broad preemption provision"); *Kwatcher* v. *Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 966 (1st Cir. 1989) (given ERISA's broad preemption of state law, "Congress specifically contemplated that federal courts, in the interests of justice, would engage in interstitial lawmaking in ERISA cases"). To achieve the Act's central purposes of protecting participants and beneficiaries and preserving plan assets, Section 502(a)(3) and (5) must be construed to give full effect to the power that Congress conferred on both private parties (participants, beneficiaries, and fiduciaries) and the Secretary to redress fiduciary violations.

The Court accordingly should grant review to settle the question on which it expressly reserved judgment in *Mertens*: Whether the courts have authority under Section 502(a)(3) and (5) to grant "equitable relief," where "appropriate," against nonfiduciaries who knowingly participate in fiduciary violations.

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[15] ERISA's legislative history supports that view of the courts' authority. The House and Senate passed bills that did not purport to make employee benefit plans an exclusively federal area of regulation. See *Shaw*, 463 U.S. at 98 & n.18 (discussing those bills, which preempted only state laws relating to the specific subjects covered by ERISA). When the conference committee changed course and opted for broad preemption, however, *id.* at 98-99, legislators expected courts to fashion a federal common law to fill gaps in the Act. See *Pilot Life*, 481 U.S. at 55-56.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-3467

ROBERT B. REICH, SECRETARY OF LABOR,
PLAINTIFF-APPELLANT

v.

CONTINENTAL CASUALTY COMPANY, ET AL.,
DEFENDANTS-APPELLEES

Argued April 22, 1994
Decided Aug. 22, 1994

BEFORE: POSNER, Chief Judge, and COFFEY and RIPPLE, Circuit Judges.

POSNER, Chief Judge.

The Department of Labor appeals from the dismissal of a suit that it brought against an insurance company for monetary relief under ERISA. The trustees of a union pension fund had obtained from Continental Casualty Company a one-year extension of the fiduciary liability insurance policy that Continental had previously issued to them. According to the Department of Labor, the extension provided only $1 million in additional coverage yet Continental charged a premium of $970,000 for the extension and the fund paid the premium. The

Department sued both the trustees and Continental—the trustees for having breached their fiduciary duty to the fund by obtaining insurance for their own protection at a price disproportionate to any possible benefit to the fund, and Continental for having knowingly participated in the trustees' breach. Relief sought included an order that "the defendants, jointly and severally, . . . restore to the [pension fund] all losses sustained as a result of the breaches of fiduciary duties or participation therein" and that Continental "disgorge all payments it received . . . as a result of its participation in the breaches of fiduciary duties."

The claim against the trustees was settled, but for less than the amount sought by the Department, so the case proceeded to trial against Continental. Midway in the trial the Supreme Court decided *Mertens v. Hewitt Associates*, —— U.S. ——, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), holding that the remedial statute under which the plaintiff had proceeded in that case—and the Department of Labor in this one—did not, in authorizing injunctions or "other appropriate relief," authorize "money damages . . . , the classic form of *legal* relief." *Id.* —— U.S. at ——, 113 S.Ct. at 2068 (emphasis in original), interpreting 29 U.S.C. § 1132(a)(3). The Court in passing described restitution, in contrast to damages, as a form of relief traditionally available in equity, —— U.S. at ——, 113 S.Ct. at 2069, so the Department in our case immediately reduced its demand for relief against Continental to the net amount that the insurance company had received for the challenged extension, some $818,000 after deduction from the premium of broker and other fees. For restitution as normally understood in civil cases seeks to deprive the defendant of money or any other thing of value that he gained from tortious or otherwise wrongful activity or that it would be

unconscionable for him to retain because received from the plaintiff in circumstances under which he knew or should have known that the plaintiff expected compensation. In either case the defendant would be unjustly enriched if allowed to keep the gain; and $818,000 is all that Continental gained from the extension of coverage.

But en route to its interpretation of "other equitable relief," the Supreme Court in *Mertens* had said that it was far from clear that a suit against a party that was (in *Mertens* as in this case) not a fiduciary but merely a knowing participant in a fiduciary's breach of duty was within the scope of the statute, regardless of the nature of the relief sought. The Court pointed out that no provision of ERISA, which it described as a carefully drafted statute, makes a nonfiduciary liable for knowing participation in a fiduciary's breach of duty, even though such liability was well established under the common law of trusts. But since the parties had assumed the applicability of the statute and quarreled only over the remedy, the Court decided to place decision on the narrow ground that the statute did not authorize the remedy of damages. *Id.* —— U.S. at ——, 113 S.Ct. at 2067-68. The doubts that the Court expressed about the existence of nonfiduciary liability under ERISA thus were dictum, which we are not bound by and which the Department of Labor urges us not to follow.

There is an initial question whether restitution should be classified as an equitable remedy; if not, the Department cannot succeed, because the statute confines it to equitable relief. Restitution is a remedy historically and today dispensed in law and equity proceedings alike. *First National Bank v. Warren*, 796 F.2d 999, 1000 (7th Cir.1986); *Medtronic, Inc. v. Intermedics, Inc.*, 725 F.2d 440, 443 (7th Cir.1984); 1 Dan R. Dobbs, *Law of Remedies* § 1.2,

p. 11; § 4.1(1), p. 556; § 4.1(3), pp. 564-65; §§ 4.2-4.3 (2d ed. 1993). Whether it is equitable depends merely on whether it is being sought in an equity suit. If the beneficiary of a trust sought an accounting of the profits of a defalcating trustee—a form of restitutionary relief—the accounting if ordered would be ordered in a suit in equity, and the remedy thus would be equitable, while a suit seeking the identical relief against a nonfiduciary would normally be a suit at law and the relief sought therefore legal. 1 Dobbs, *supra*, § 4.3(5), pp. 608-14. A special wrinkle here, however, is that the concept of liability for (in effect) aiding and abetting a fiduciary's misconduct comes out of the law of trusts (as noted in *Mertens*, see —— U.S. at ——, 113 S.Ct. at 2067; see also *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942); 4 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 326, p. 291 (4th ed. 1989)) which along with the closely related concept of fiduciary obligation was invented by equity judges. *Mertens v. Hewitt Associates*, *supra*, —— U.S. at ——, 113 S.Ct. at 2068; *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571 n. 8, 110 S.Ct. 1339, 1348 n. 8, 108 L.Ed.2d 519 (1990); 3 Scott & Fratcher, *supra*, § 197, p. 188. It is thus an equitable concept, so it can be argued that the Department of Labor is seeking restitution as an equitable remedy in an equity suit.

The Court's search in *Mertens* was, however, for *distinctively* equitable relief on the one hand and, on the other, *distinctively* legal relief, such as damages, which though sometimes awarded by a court of equity under the "cleanup" doctrine, *Medtronic, Inc. v. Intermedics, Inc.*, *supra*, 725 F.2d at 442-43, is the classic remedy at law; unfortunately restitution straddles this divide. The Court may have seemed to place it on the equitable side; other cases, too, have described restitution as an equitable remedy. E.g.,

Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, supra, 494 U.S. at 570, 110 S.Ct. at 1347; *Tull v. United States*, 481 U.S. 412, 424, 107 S.Ct. 1831, 1838, 95 L.Ed.2d 365 (1987). But we think it more likely that all the Court meant in any of these cases was that restitution, in contrast to damages, is a remedy commonly ordered in equity cases and therefore an equitable remedy in a sense in which damages, though *occasionally* awarded in equity cases, are not. Restitution is merely not an *exclusively* equitable remedy like an injunction. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 49 n. 7, 109 S.Ct. 2782, 2794 n. 7, 106 L.Ed.2d 26 (1989); *United States v. Fountain*, 768 F.2d 790, 801 (7th Cir.1985); *Austin v. Shalala*, 994 F.2d 1170, 1176 n. 6 (5th Cir.1993). On this interpretation, which seems the more plausible and conforms to a correct understanding of both historical and current practice, restitution is a legal remedy when ordered in a case at law and an equitable remedy (rather than a legal remedy pressed into service to provide complete relief in an equity case—the rationale of the "clean up" doctrine) when ordered in an equity case. This interpretation helps the Department of Labor in this case, since, although it was seeking restitution against a nonfiduciary, the basis for its claim was a duty founded on equitable rather than legal principles. Had the Department's claim gone to trial, therefore, neither party would have been entitled to a jury trial. Cf. *Wardle v. Central States, Southeast & Southwest Areas Pension Fund*, 627 F.2d 820, 829 (7th Cir.1980); *In re Vorpahl*, 695 F.2d 318 (8th Cir.1982).

But *was* the Department of Labor seeking restitution? It was seeking not a profit, but merely a receipt, an insurance premium, net of some expenses; to call this a "profit," it could be argued, would convert every suit for the price of a contract into a

suit for restitution, contrary to the law. 1 Dobbs, *supra*, § 4.1(2), p. 559. But what the Department was really seeking, and what the concept of unjust enrichment and its remedial corollary restitution do encompass, was to recover a "negative unjust enrichment," consisting of the unjust avoidance of a loss. 1 *id.*, § 509, pp. 802-03; Dan B. Dobbs, *Handbook on the Law of Remedies: Damages-Equity-Restitution* § 4.5, p. 278 (1973). The Department's argument is that Continental Casualty was already liable for the claims against the trustees that the $1 million extension of coverage was ostensibly obtained to cover, so that the $818,000 net premium reduced its underwriting losses by that amount. It benefited to that extent, and at the expense of the pension fund. "Negative unjust enrichment" is a clumsy term, but the concept is straightforward. If *A* steals from *B* to pay a debt to *C*, *A* is unjustly enriched at *B*'s expense, even though the consequence of the theft was to reduce *A*'s obligation to *C* rather than to put money in *A*'s pocket.

Why, if Continental was already liable for the claims against the trustees, the trustees would pay for the extension of coverage is not explained by this theory; but we need not worry about this, for quite apart from any doubts about the character of the remedy sought the Department of Labor has no claim. A majority of the Supreme Court has made clear its view that Congress's omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary's breach of fiduciary obligations was not inadvertent; that Congress knew that at common law (including in that term the judge-made law of equity) nonfiduciaries were subject to "knowing participation" liability in trust cases, and knowing this decided not to cast the net of ERISA liability that wide. This is a strict constructionist's approach that we might not embrace as an original

matter. ERISA is a detailed and carefully drafted statute, true. But Congress is not omniscient, and even its detailed and carefully drafted statutes contain inadvertent omissions that courts might properly undertake to rectify if satisfied that by doing so they would not be upsetting a compromise—satisfied, that is, that the omission was indeed inadvertent rather than deliberate. We are impressed by the Department's argument that the scope of ERISA's preemption provision is so broad that pension funds may well be remediless against knowing participants in fiduciary misconduct (its remedy against the misbehaving fiduciaries themselves may be inadequate because of the limitations of their solvency, and proved to be so in this case), though the force of this point is diminished by the fact that the *holding* in *Mertens*, which we are not free to question, strips the pension funds, or here their surrogate the Department of Labor, of their principal remedy—a suit for damages.

The Supreme Court considered all these points in *Mertens* and found them unimpressive. The majority opinion goes out of its way to throw cold water on the idea of an implied liability of nonfiduciaries for knowing participation in fiduciaries' misconduct. The discussion is dictum, but it is considered dictum. If we thought the Court had overlooked some point that might have altered its view, we would be less reluctant to buck the dictum. But it appears not to have. The Department's brief in our case devotes only a few pages to criticism of the *Mertens* dictum, and the points it makes were addressed and rejected by the Court.

Justice Holmes has been derided for claiming in "The Path of the Law," 10 *Harv.L.Rev.* 457, 461 (1897), that the law is merely a prediction of what the courts will do. The theory has many weaknesses, but also a valid core. In areas of profound uncertainty,

such as whether a statute that does not explicitly impose duties on nonfiduciaries should be interpreted as doing so implicitly because of the background of trust law against which it was enacted and the vagueness and breadth of "other appropriate relief" with no specified limitation as to whom the relief can be sought from, federal law is for all practical purposes what the Supreme Court says it is. When the Court's view is embodied in a holding, the Court's reluctance to overrule its precedents enables a confident prediction that that holding is "the law." When the view is embodied in a dictum, prediction cannot be made with the same confidence. But where it is a recent dictum that considers all the relevant considerations and adumbrates an unmistakable conclusion, it would be reckless to think the Court likely to adopt a contrary view in the near future. In such a case the dictum provides the best, though not an infallible, guide to what the law is, and it will ordinarily be the duty of a lower court to be guided by it.

Thornton v. Evans, 692 F.2d 1064, 1078 (7th Cir.1982), decided by this court many years before *Mertens*, held that an ERISA plaintiff could obtain relief against nonfiduciaries who conspired with a fiduciary to violate the statute. The line between conspiracy and knowing participation is so fine that we have grave doubts, unnecessary however to resolve in this case, that *Thornton* survived *Mertens*. But we have no doubt that the district judge was right to dismiss the Department's suit on the authority of *Mertens*.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 89 C 7692

ROBERT REICH, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF

v.

CONTINENTAL CASUALTY COMPANY, ET AL., DEFENDANTS

July 2, 1993

MEMORANDUM OPINION AND ORDER

LINDBERG, District Judge.

Plaintiff, Robert Reich, Secretary of the United States Department of Labor, brought this action alleging violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, by the trustees of the Hotel Employees and Restaurant Employees International Union Pension and Welfare Plans in their purchase from Continental Casualty Company (CNA) of fiduciary liability insurance coverage and the knowing participation by CNA in those violations. A bench trial on plaintiff's claim against CNA was commenced and then adjourned. During the adjournment, the United States Supreme Court issued an opinion in *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993),

which opinion was brought to the attention of the court by plaintiff. At plaintiff's suggestion, the court postponed resumption of the bench trial and ordered the parties to submit memoranda regarding the impact of the *Mertens* opinion on the claim against CNA.

In his memorandum, plaintiff argues:

> [T]he *Mertens* opinion in no manner impairs the Secretary's underlying claim for relief against CNA as a non-fiduciary who knowingly participated, to its financial benefit, in the trustees' fiduciary violations of ERISA. The holdings in *Thornton v. Evans*, 692 F.2d 1064 (7th Cir. 1982), and *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531 (7th Cir. 1991), remain the controlling law in this circuit as to the viability of such a claim. Rather, *Mertens* solely addresses appropriate remedial relief available against a non-fiduciary who knowingly participates in a fiduciary breach to its financial benefit. Thus, should the Secretary prevail in his burden of establishing the trustees' breach of fiduciary responsibility and CNA's knowing participation in that breach, the Court remains empowered to fashion relief against CNA consistent with the *Mertens* opinion: restitution to the Plans of the unjust enrichment, or financial benefit, which CNA received by reason of its knowing participation.

While it is true that the Court in *Mertens* did not hold that a claim such as that against CNA is not viable, it did very strongly suggest that this was so.

Near the beginning of the opinion in *Mertens*, the Court states:

> We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment. And while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely, moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. See § 405(a), 29 U.S.C. § 1105(a). That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts. See 3 A. Scott & W. Fratcher, Law of Trusts § 224.1, p. 404 (4th ed. 1988) (hereinafter Scott & Fratcher) (cotrustees); 4 Scott & Fratcher § 326, p. 291 (third persons). In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate

> expressly." 473 U.S., at 146-147. All of this notwithstanding, petitioners and their *amicus* the United States seem to assume that respondent's action (or inaction) violated ERISA, and address their arguments almost exclusively to what forms of relief are available. And respondent, despite considerable prompting by its *amici*, expressly disclaims reliance on this preliminary point. See Brief for Respondent 18, n. 15; Tr. of Oral Arg. 46. Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question.

Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993), slip op at 5-6. The court, in addressing a point made by the dissenting opinion, further states:

> The dissent expresses its certitude that "the statute clearly does not bar such a suit." *Post*, at 3, n. 1. That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit. To meet that requirement, it is not enough to observe that "trust beneficiaries clearly had such a remedy [against nonfiduciaries who actively assist in the fiduciary's breach] at common law." *Ibid.* They had such a *remedy* because nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach. A similar duty is set forth in ERISA; but as we have noted, only *some* common-law "nonfiduciaries" are made subject to it, namely, those who fall within ERISA's artificial definition of "fiduciary."

Mertens v. Hewitt Associates, 113 S. Ct. 2063 (1993), slip op at 6, n 5.

Thus, a [*sic*] previously noted, plaintiff is correct to the extent that the Court in *Mertens* did not hold that claims such as the one against CNA in the case at bar are not actionable under ERISA, and expressly reserved decision on that issue. However, it would be foolish for this court to ignore the Supreme Court's relatively extended and careful statement of its views on the subject, which included a response to a statement in the dissenting opinion, merely because it is dicta. This is particularly true in light of the strength of the statement of those views; in light of the lack of any indication by the Court that it is doubtful on the question.

This court believes that the *Mertens* opinion precludes the claim plaintiff has brought against CNA; and further, that, at such time as the issue is presented to the United States Court of Appeals, Seventh Circuit, that court will follow the view expressed by the Supreme Court in *Mertens*.

Based upon the foregoing, the court concludes that plaintiff has failed to state a claim upon which relief can be granted against CNA, which is of course an issue which may be raised at trial. FRCP 12(h)(2), Rule 52 provides:

> If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim . . . that cannot under the controlling law be maintained . . . without a favorable finding on that issue . . .

FRCP 52(c). Plaintiff has been fully heard with respect to the issue of whether he has stated a claim against CNA, the court has found against plaintiff on that issue, and plaintiff's claim against CNA cannot be maintained under the controlling law without a

favorable finding on that issue. The court accordingly will enter judgment as a matter of law in favor of CNA and against plaintiff on the claim against CNA.

ORDERED: Judgment is entered in favor of defendant CNA and against plaintiff, Robert Reich, Secretary of the United States Department of Labor, on plaintiff's claim against CNA.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* (1988 & Supp. V 1993), provides in pertinent part:

§ 1105. Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

* * * * *

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

* * * * *

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

* * * * *

(*l*) Civil penalties on violations by fiduciaries

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

* * * * *

Supreme Court, U.S.
FILED
JAN 25 1995
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(2)

No. 94-1094

In The

Supreme Court of the United States

October Term, 1994

ROBERT B. REICH, SECRETARY OF LABOR,

Petitioner,

v.

CONTINENTAL CASUALTY COMPANY and AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether ERISA affirmatively authorizes a cause of action against a nonfiduciary on the basis that the nonfiduciary knowingly participated in a fiduciary's breach of duty.

2. Whether the relief sought by the Secretary in this case was equitable.

STATEMENT OF CORPORATE RELATIONSHIPS

CNA Financial Corporation is the parent corporation of Continental Casualty Company, which in turn is the parent corporation of American Casualty Co. of Reading, Pennsylvania. Continental Casualty also owns 90.6% of Agency Management Services, Inc. American Casualty Co. has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTIONS PRESENTED..... i

STATEMENT OF CORPORATE RELATIONSHIPS... ii

TABLE OF AUTHORITIES..... iv

COUNTER-STATEMENT..... 1

A. Policy And Cancellation..... 1

B. The Coverage Action..... 2

C. Settlement Agreement..... 3

D. Subsequent Events..... 4

E. The Current Action..... 6

REASONS FOR DENYING THE PETITION..... 8

I. REVIEW OF THE *MERTENS* DICTUM IS NOT NECESSARY..... 9

A. The Secretary's Current ERISA Arguments Were All Rejected In *Mertens* And The Secretary Offers Nothing New..... 9

B. The Court Has Already Relied On And Reaffirmed Its Views In *Mertens*..... 11

C. The Circuits Are Not Divided..... 12

D. This Case Demonstrates Why The Court's Views In *Mertens* Are Correct..... 12

II. REVIEW SHOULD NOT BE GRANTED BECAUSE THIS WAS A CASE FOR DAMAGES..... 14

CONCLUSION..... 17

TABLE OF AUTHORITIES

Page

CASES

Bausch & Lomb Inc. v. Bressler, 977 F.2d 720 (2d Cir. 1992) 16

Central Bank of Denver v. First Interstate Bank of Denver, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994)...8, 11

Chris-Craft Indus. Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), and *cert. denied*, 414 U.S. 924 (1973)..... 15

Donovan v. Schmoutey, 592 F.Supp. 1361 (D. Nev. 1984) 13

Franklin v. United States, 992 F.2d 1492 (10th Cir. 1993) 6

Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966) 15

Kessler v. Continental Casualty Co., 132 Ill. App. 3d 540, 477 N.E.2d 1287 (1985) 3

McCray v. New York, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983) 12

Mertens v. Hewitt Assocs., 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) ..... *passim*

Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968) 15

Parks v. Pavkovic, 753 F.2d 1397 (7th Cir.), *cert. denied*, 473 U.S. 906 (1985), and *cert. denied*, 474 U.S. 918 (1985) 15

Pension Benefit Guaranty Corp. v. Ross, 781 F.Supp. 415 (M.D.N.C. 1991) 13

Reich v. Continental Cas. Co., 33 F.3d 754 (7th Cir. 1994) 9

TABLE OF AUTHORITIES – Continued

Page

Sears, Roebuck & Co. v. Commissioner, 972 F.2d 858 (7th Cir. 1992) 12

Truck Ins. Exchange v. Ashland Oil, Inc., 951 F.2d 787 (7th Cir. 1992) 5

STATUTES

15 U.S.C. § 78j 11

29 U.S.C. § 1105(a)(1) 13

29 U.S.C. § 1132(a)(3) and (5) 10

29 U.S.C. § 1132(l) 10

TREATISE

D. Dobbs, *Remedies* § 4.6 (1973) 15

COUNTER-STATEMENT

This claim was based on the tenuous concept that a nonfiduciary insurance company can somehow be liable under ERISA for entering into an arms-length settlement of a lawsuit brought against it by plan trustees. Because the facts demonstrate why the Court's views in *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), were correct, and because they also show that this case was one for damages barred even by the Court's ultimate holding in *Mertens*, Respondents provide this counter-statement.

A. Policy And Cancellation

Respondents Continental Casualty Company and American Casualty Company of Reading, Pennsylvania do business under the service mark "CNA." In 1978, CNA began providing fiduciary liability insurance to the trustees of the Hotel Employees and Restaurant Employees International Union Welfare and Pension Plans (the "Plans"). (A. 37.)[1] In October 1984, CNA issued a renewal policy for a term of three years and annual limits of $5 million. (A. 37, 199-205.) It was a "claims-made" policy, providing coverage for "wrongful acts" of the insureds as long as the claim was first made during the policy period. (A. 37, 145-162.)

Before July 1985, CNA was already paying for the defense of the insureds in a claim entitled *Cullerton v.*

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[1] References to "A" are to the appendices of the record filed in the appellate court.

Liever in Las Vegas. (A. 38.) In July 1985, the Secretary filed an ERISA claim against the insureds and others in New Jersey, entitled *Brock v. Gerace* (the "*Gerace* claim"). (A. 38-39, 130-44.) Because of adverse claims history, the insurance agent sent notice of cancellation, effective October 17, 1985, the end of the first year of the policy. (A. 39, 127.)

The policy contained an "extended reporting option" which could be exercised only upon cancellation. The trustees exercised that option, under which coverage would be extended for one year for claims made during that year but only if the "wrongful acts" occurred before the initial date of cancellation. The net effect was that the trustees had no coverage for any actions they would take after October 17, 1985. (A. 39-40, 117, 146.)

B. The Coverage Action

The Plans governing declaration of trust required fiduciary liability insurance to be in place. (A. 222.) Counsel for the Plans informed the trustees it was necessary to have insurance in place. (A. 316-18, 92, 101-03.) Throughout the fall of 1985, the trustees searched for replacement coverage but found none. (A. 50, 333, 344-48.) The market for such insurance had collapsed. Those who could buy it were paying greatly increased premiums and those with an adverse claims history could not buy it at any price. (A. 257-58, 286, 295, 346-49.) The Secretary stipulated that replacement insurance was not available to these trustees anywhere in the world. (A. 50, 348-49.) Management trustees considered resigning if insurance was not found

(A. 92, 289-90, 319), and voting on important plan business was deferred while the search was conducted. (A. 90.)

On December 16, 1985, the trustees sued CNA in Illinois state court (the "Coverage Action"), seeking to compel CNA to reinstate the insurance based primarily on the theory that the notice of cancellation sent was ineffective under Illinois law because it did not specify the reason for cancellation. (A. 40.) The state court issued a temporary restraining order requiring CNA to provide insurance during the term of the order. The court did so despite expressing doubts as to the ability of the trustees to succeed on the merits and despite a directly opposite state appellate decision precluding such relief. *Kessler v. Continental Casualty Co.*, 132 Ill. App. 3d 540, 477 N.E.2d 1287 (1985). (A. 41, 95-97, 230.) The parties' counsel began settlement discussions which continued into early 1986, during which time the TRO was continued by agreement. (A. 41.)

C. Settlement Agreement

Throughout this period, CNA dealt only with the trustees' counsel (A. 41-42, 311), who insisted that any settlement had to involve reinstatement of coverage. CNA was reluctant to do so but eventually acceded. (A. 304-05, 273, 282.) A point of concern in the negotiations was the *Gerace* claim. The trustees' counsel asserted that the *Gerace* claim had no merit, and he had written an opinion letter to that effect. (A. 231-33, 277-78, 283-84, 327.) The idea arose for a settlement to pin future coverage on the costs of the *Gerace* claim. An initial settlement

agreement was negotiated and then rejected by the trustees. (A. 41-42, 104-05, 106-16.)

The parties then reached a settlement agreement similar to the first. The trustees agreed to pay an additional premium of $970,000. CNA agreed to issue an endorsement to the policy rescinding cancellation and reinstating coverage for the period October 1985-87. The limits applicable to those last two years of the policy would be $2 million combined defense and indemnity subject to a reduction of up to $1 million based on the costs of the *Gerace* claim. (A. 42-43, 118-126, 117a-117b.) The effect was that at least $1 million of insurance would be available for future acts and claims, and more would be available if the *Gerace* claim ended up costing any amount less than $1 million. (A. 117a-117b.) By the time the agreement was finally signed by all, CNA had spent about $300,000 in *Gerace*. (A. 210.) On March 27, 1986, the state court entered an order dismissing the coverage claim against CNA, which then issued the agreed endorsement ("Endorsement No. 7") to the policy. (A. 43-44, 117a-117b, 163.)

D. Subsequent Events

In May 1986, the Secretary filed another ERISA claim against the trustees and others in Nevada, *Brock v. Hanley* (the "*Hanley* claim"). (A. 46.) CNA began defending under the terms of Endorsement No. 7. That claim asserted wrongful acts of the trustees occurring before October 1985 *and* wrongful acts occurring after October 1985, *i.e.*, acts for which coverage would not have existed but for Endorsement No. 7. (A. 167-89.)

In the fall of 1986, the Secretary learned of Endorsement No. 7 and subpoenaed documents relating to it and interviewed witnesses. (A. 47, 234-36, 48-49, 329-31.) The *Gerace* and *Hanley* claims continued in litigation until 1988, at which time they were settled through negotiations with the Secretary. (A. 48, 190-93, 194-96.) By that time, CNA had spent more than $1 million in defense costs in *Gerace*. (A. 47-48.)

Pursuant to the settlement of the *Gerace* and *Hanley* claims, CNA paid a total in indemnity for the trustees of $2.8 million ($1.95 million for *Gerace*, and $850,000 for *Hanley* under Endorsement No. 7). (A. 48, 237, 238.) That money went to the Plans. (A. 190-93, 194-96.) In addition, CNA paid out $2.27 million in defense costs for *Gerace* and $132,900 for *Hanley*. (A. 237, 238.) Thus, for a total policy premium of about $1 million, CNA paid out more than $5 million, including $982,900 under Endorsement No. 7.

When CNA's insurance expired in 1987, the trustees were able to acquire from other insurers a one-year replacement policy with combined defense and indemnity limits of $2 million and a premium of $750,000. (A. 239-40). That policy precluded coverage for any wrongful acts that occurred before its issuance. (A. 239-40.) As a result, it provided significantly reduced coverage in comparison to CNA's policy which had provided prior acts coverage.[2]

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[2] *See Truck Ins. Exchange v. Ashland Oil, Inc.*, 951 F.2d 787, 791 (7th Cir. 1992) (recognizing that exclusion of prior acts coverage in such insurance substantially reduces its value).

E. The Current Action

Despite knowing of the events concerning the settlement of the Coverage Action, the Secretary did not attempt to bring a claim against CNA until after the Secretary had settled the *Gerace* and *Hanley* claims, *i.e.*, until after CNA had paid $2.8 million to the Plans under the terms of the policy with Endorsement No. 7.

In October 1989, the Secretary filed the current ERISA claim against CNA and the trustees. The Secretary conceded CNA was not a "fiduciary" as defined in ERISA. (A. 10, 36, 61-67.) Following discovery, the district court entered a final pre-trial order, which superseded anything in the complaint, *e.g.*, *Franklin v. United States*, 992 F.2d 1492, 1497 (10th Cir. 1993), and contained the theories and relief the Secretary was actually pursuing. The Secretary settled with the trustees under an agreement which required the trustees to pay *nothing*. (A. 86-87.) The case then proceeded through a partial trial.

According to the Secretary's submissions in the final pre-trial order, the relief he was seeking was to recover the "losses to the Plans." (A. 68-69, 63, 73.) The submissions mention "restitution" but only in the phrase "restitution . . . for all losses to the Plans." (A. 73.) The Secretary sought recovery of the entire $970,000 premium plus interest. (A. 63-65, 68-69, 73-74.)[3] The Secretary did

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[3] In its petition, the Secretary attempts to rely on the relief allegations asserted in the complaint to show he was seeking equitable relief. (Secretary's Petition at 6.) The final pre-trial order controlled this case and in that order the Secretary made it clear he was seeking monetary relief to recover the "losses to the Plans," *i.e.*, damages.

not mention any of the usual concepts of restitution, such as that he was seeking to recover the profits CNA had made (which were none), that he was offering the return of any insurance amounts CNA had paid or to allow their deduction from the $970,000, or that the parties should otherwise be put back into the position they were in before the settlement of the Coverage Action. In fact, the Secretary asserted that whether CNA made a profit was irrelevant to the case because he was seeking the losses to the Plans. (A. 268-69.) The district court entered an order precluding the Secretary from arguing that CNA had profited from the transaction. (A. 88-89, 75-81.)

The crux of the Secretary's theory of liability was that, in hindsight, Endorsement No. 7 ended up providing only $1 million in future coverage for $970,000 in premium, and CNA violated ERISA by providing such insurance. (A. 53, 57.) The Secretary conceded like insurance could not have been purchased elsewhere for less. (A. 50, 348-49.) Also, the Secretary's expert would not give the opinion that the amount of the premium was unreasonable. (A. 88-89, 75-81.) According to the Secretary, the trustees, when they were considering entering into the settlement of the Coverage Action, did not adequately investigate the potential effects of the settlement and were acting in the interest of protecting themselves from future liability rather than in the interest of the Plans. (A. 53, 56-58, 72-73.) CNA, which dealt only with the trustees' counsel in those settlement negotiations and thus had no knowledge of what the trustees actually did or considered (A. 41-42, 311), somehow "knowingly" participated in the breach. The Secretary contended CNA could be charged with knowledge of a breach because it

knew it was dealing with trustees and had received Plan assets and should have known the premium was close to the policy limits. (A. 61-62, 68, 73.)

During a break in the trial, the Court decided *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063 (1993). The district court requested briefing on its impact and the Secretary submitted a brief attempting to change his trial theory of relief by alleging he would seek recovery of $818,107 by allowing deductions for some fees and expenses to the $970,000 premium. Relying on the dictum in *Mertens* that nonfiduciaries cannot be sued for participation in a fiduciary breach, the district court dismissed the case and the appellate court affirmed.

REASONS FOR DENYING THE PETITION

The Court should deny review for two reasons. First, the view expressed by the majority of the Court in *Mertens v. Hewitt Assocs.*, 113 S.Ct. 2063 (1993) (hereinafter "*Mertens*"), that nonfiduciaries cannot be sued under ERISA for knowing participation in a fiduciary's breach, does not need to be revisited because: (a) the Court actually considered and rejected the ERISA arguments the Secretary is now making for seeking review, not only in relation to the dictum in *Mertens*, but also in relation to the Court's ultimate holding; (b) the Court itself has relied on and reaffirmed its views in *Mertens* in *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994); and (c) there is currently no division among the circuits as to the impact of *Mertens*. Moreover, the facts of this case demonstrate why courts

should not read into ERISA duties and causes of action not expressly provided for.

Second, though the appellate court did not ultimately rule on the issue, this case was one seeking damages and not traditional equitable relief.[4] Thus, the claim is controlled by the Court's ultimate holding in *Mertens* that such relief is not available under ERISA from nonfiduciaries.

I.

REVIEW OF THE *MERTENS* DICTUM IS NOT NECESSARY

A. The Secretary's Current ERISA Arguments Were All Rejected In *Mertens* And The Secretary Offers Nothing New

The Secretary's arguments for construing ERISA to allow claims against nonfiduciaries for knowing participation in a fiduciary breach were all briefed in *Mertens* and rejected, not only in relation to the dictum in *Mertens* but also in relation to the Court's ultimate ruling precluding damages claims. The Court, in relation to the damages holding expressly rejected the Secretary's arguments here: (a) that claims which existed under the common law of trusts should be read into ERISA; (b) that ERISA's

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[4] The Secretary contends the appellate court agreed that the actual relief he was seeking "in this case" was restitution for the "unjust avoidance of a loss." (Secretary's Petition at 8.) In fact, the appellate court questioned whether restitution was the relief being sought, and ultimately avoided deciding the issue. *Reich v. Continental Cas. Co.*, 33 F.3d 754, 756-57 (7th Cir. 1994) (included in Secretary's Petition, Appendix A at 5a-6a).

purpose to protect plan beneficiaries would be thwarted if common law claims are not recognized; (c) that broad preemption requires broad protection because otherwise beneficiaries will end up with less protection than under the common law; and (d) that the "federal common law" can be used to read into the statute duties and claims not expressly provided for. 113 S.Ct. at 2068-72. The Court also rejected the Secretary's argument that section 502(l), 29 U.S.C. § 1132(l), indicates that claims against nonfiduciaries are allowed, by holding section 502(l) could be construed to be consistent with a finding that nonfiduciaries cannot be sued. 113 S.Ct. at 2070-71.

The Secretary provides nothing to challenge the impeccable reasoning of the Court for its belief that nonfiduciaries cannot be sued at all for knowing participation in a fiduciary breach. As the Court noted, no provision of ERISA creates a duty to avoid such participation by nonfiduciaries, though such a duty is created for cofiduciaries. 113 S.Ct. at 2067. The equitable remedies provisions of ERISA, 29 U.S.C. § 1132(a)(3) and (5), only allow such relief to redress violations of other provisions of ERISA. Since nonfiduciaries are not covered by the fiduciary duty provisions, they cannot violate them. *Id.* ERISA provides a broad definition of "fiduciary," which includes many, but not all, common law nonfiduciaries. Thus, as the Court said, the absence of a claim against nonfiduciaries appears deliberate. *Id.*

Thus, all the ERISA arguments the Secretary raises in his petition were raised and rejected in *Mertens* and the Secretary provides no new grounds for having the Court reconsider what it said.

B. The Court Has Already Relied On And Reaffirmed Its Views In *Mertens*

In *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S.Ct. 1439 (1994), the Court held that aiders and abettors cannot be liable under section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j, because the section does not expressly create liability for such persons (*i.e.*, the same issue involving nonfiduciaries under ERISA). In so holding, the Court relied partly on *Mertens*, stating:

> Last Term, the Court faced . . . a case *raising the question whether knowing participation in a breach of fiduciary duty is actionable under ERISA. Mertens* . . . The petitioner in *Mertens* said that the knowing participation cause of action had been available in the common law of trusts and should be available under ERISA. *We rejected that argument* and noted that no provision in ERISA "explicitly require[d] [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* . . . 113 S.Ct., at 2067. While plaintiffs had a remedy against nonfiduciaries at common law, that was because "nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach." *Id.* . . . 113 S.Ct., at 2068, n. 5. No comparable duty was set forth in ERISA.

Central Bank, 114 S.Ct. at 1447 (some emphases added) (citations partially omitted).

Thus, the Court has already made it clear it meant what it said in *Mertens* and additional review is not needed.

C. The Circuits Are Not Divided

There is currently no division among the circuit courts as to the impact of *Mertens* and thus no need to take review at this time. The Secretary's petition itself concedes the circuits have thus far been consistent on *Mertens* and the trend is to follow the dictum. (Secretary's Petition at 11-12.) What the Secretary requests is for the Court to resolve a division of the circuit courts that existed before *Mertens*. The Court should instead wait until other circuits have reconsidered their prior holdings in light of *Mertens* and *Central Bank* and then determine whether further review of the issue is necessary. *See McCray v. New York*, 461 U.S. 961, 962, 103 S.Ct. 2438, 2439, 77 L.Ed.2d 1322 (1983) (opinion of Stevens, J., respecting denial of cert.) (noting that "further consideration . . . of the problem by other courts will enable us to deal with the issue more wisely at a later date.")

D. This Case Demonstrates Why The Court's Views In *Mertens* Are Correct

CNA was sued because the Secretary did not like the result of an arms-length settlement agreement of a lawsuit. The crux of the Secretary's case is that it is wrong to charge a premium close to limits for insurance. However, the Secretary had no evidence to show the amount of the premium was unreasonable. Moreover, as courts have recognized, premiums for liability insurance in the commercial market are often close to the amount of insurance provided. *Sears, Roebuck & Co. v. Commissioner*, 972 F.2d 858, 862 (7th Cir. 1992).

The Secretary's theory was that the trustees, when they were considering the settlement, did not adequately investigate its potential effects and were considering their own interest to prevent future liability rather than the interests of the Plans. CNA, which dealt only with the trustees' counsel in the settlement negotiations, can somehow be sued as a "knowing" participant in that breach despite having no knowledge of what the trustees actually did or considered. By the time of trial, the Secretary was arguing for a "constructive knowledge" standard under ERISA, contending CNA could be charged with knowledge of the trustees' breach simply because it knew it was dealing with trustees and that plan assets were transferred.

The Secretary was able to present this theory only because of the complete absence of any ERISA standards applicable to this claim. Though "cofiduciaries" under ERISA are liable for knowing participation in another fiduciary's breach only upon a showing of actual knowledge of the breach, 29 U.S.C. § 1105(a)(1), some pre-*Mertens* courts had gone so far as to hold that nonfiduciaries can be liable merely by proving the constructive knowledge theory the Secretary asserted. *E.g., Donovan v. Schmoutey*, 592 F.Supp. 1361, 1395-96 (D. Nev. 1984). In essence, nonfiduciaries could be sued even under circumstances that cofiduciaries could not.

Other courts took the view that the common law requires actual knowledge of the breach. *See, e.g., Pension Benefit Guaranty Corp. v. Ross*, 781 F.Supp. 415, 418 (M.D.N.C. 1991). What the pre-*Mertens* cases demonstrate is that the standard of scienter to be applied to nonfiduciaries varies at common law. A view that common law

duties can be read into ERISA when ERISA provides no standards for them means parties like CNA are left in the dark as to standards applicable to them, particularly since the common law itself differs from jurisdiction to jurisdiction, and allows parties like the Secretary to make whatever argument they want to fit a particular case. The facts of this case thus demonstrate why the Court's views in *Mertens* are correct. ERISA contains nothing to indicate that a nonfiduciary can somehow violate its provisions by entering into an arms-length settlement of a lawsuit. The Secretary was able to create and pursue this otherwise meritless case only because some courts had been engaging in the unwise practice of reading into ERISA all of the common law of trusts, which law is itself diverse.

II.

REVIEW SHOULD NOT BE GRANTED BECAUSE THIS WAS A CASE FOR DAMAGES

The Court should avoid further review of this case because the Secretary was not seeking traditional equitable relief of "restitution" but instead was seeking damages. The case is thus controlled by the Court's ultimate holding in *Mertens*.

In the controlling final pre-trial order, the Secretary made it clear that he was only seeking "the losses to the Plans" and wanted CNA to pay $970,000 plus interest. As the Court in *Mertens* recognized, seeking monetary relief for "losses [the] plan sustained" is a claim for damages. 113 S.Ct. at 2068. Labeling it "restitution" does not make it so.

Restitution is a claim to recover the profits made by a defendant from a wrongful act. *E.g., Parks v. Pavkovic*, 753 F.2d 1397, 1408 (7th Cir.) (amount of restitution is measured by "profit" made by defendant, not loss sustained by plaintiff), *cert. denied*, 473 U.S. 906 (1985), and *cert. denied*, 474 U.S. 918 (1985). CNA made no profit from the transaction involved here (it lost millions) and the district court ruled the Secretary could not even argue that CNA had profited from the transaction.

Moreover, restitution was not available as a remedy here. This case involved a contract, the settlement agreement for the Coverage Action, in which both sides gave consideration. Restitution is unavailable in such circumstances absent rescission of the contract and return to the *status quo ante*, *i.e.*, the consideration given by the defendant must be returned or its value deducted from the plaintiff's recovery. *E.g., Myzel v. Fields*, 386 F.2d 718, 741-42 (8th Cir. 1967), *cert. denied*, 390 U.S. 951 (1968); *Hogan v. Wright*, 356 F.2d 595, 598 (6th Cir. 1966); *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 391 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), and *cert. denied*, 414 U.S. 924 (1973). The Secretary never actually sought rescission and never offered to restore the parties to the *status quo ante* – to do so would have resulted in no recovery.

Also, restitution is not available if circumstances have so changed that it would be inequitable to require a defendant to make restitution. D. Dobbs, *Remedies* § 4.6 (1973). Relying on the policy with Endorsement No. 7, CNA provided coverage for the *Gerace* and *Hanley* claims and ended up paying the Plans $2.8 million in relation to the settlement for those claims. The Secretary, who negotiated those settlements, knew of the events that gave rise

to this claim long before those cases were settled. Instead of pursuing an immediate suit, the Secretary waited until after CNA had fully covered those claims and then sued to challenge the very agreement under which such coverage was provided.

By the time this case was filed, circumstances had so changed that it would have been inequitable to allow restitution. It was not possible to undo all the transactions that flowed from the issuance of Endorsement No. 7 and it was not possible to return the parties to the position they were in before the settlement of the Coverage Action.

Finally, the Secretary's attempt, after *Mertens* was decided, to change his theory of recovery to seek $818,107 by allowing some setoffs did nothing to change this case into one for "restitution." His new theory was still one for damages. A true restitutionary theory would have looked at the settlement agreement of the Coverage Action to evaluate it as to whether unjust enrichment occurred at the time it was entered into, *i.e.*, in this case, whether the amount of premium charged was unreasonable in relation to the value of the insurance CNA agreed to provide. *See Bausch & Lomb Inc. v. Bressler*, 977 F.2d 720, 730 (2d Cir. 1992) (when consideration given by defendant is the right to a future benefit, restitution is measured by the difference between the price paid and the market value of the right; the negotiated contract price is the best evidence of the right's value absent other readily obtainable evidence of market value). If a trustee wrongfully sells $1 million in trust property to a nonfiduciary but the nonfiduciary happens to provide $1 million in value in return, the nonfiduciary cannot possibly be unjustly enriched. The Secretary's own theory of this case conceded that CNA

gave at least $1 million in future insurance coverage (and then paid it out) in return for the $970,000 additional premium. The Secretary had no evidence to show the amount of premium was unreasonable. Thus, under any true restitutionary theory, CNA was not unjustly enriched.

CONCLUSION

The petition for a writ of certiorari should be denied.

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(3)

No. 94-1094

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In the Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT B REICH, SECRETARY OF LABOR, PETITIONER

v.

CONTINENTAL CASUALTY COMPANY
AND
AMERICAN CASUALTY COMPANY OF READING,
PENNSYLVANIA, MEMBERS OF THE CNA INSURANCE
COMPANIES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Central Bank v. *First Interstate Bank*, 114 S. Ct. 1439 (1994)	6
Firestone Tire & Rubber Co. v. *Bruch*, 489 U.S. 101 (1989)	4, 6
Foman v. *Davis*, 371 U.S. 178 (1962)	8
Mertens v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993)	1, 2, 3, 4, 5, 6
Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983)	4
Stauffer v. *Stauffer*, 351 A.2d 236 (Pa. 1976)	2
Statutes and rule:	
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:	
§ 3(9), 29 U.S.C. 1002(9)	4
§ 3(21), 29 U.S.C. 1002(21)	4
§ 404(a)(1)(A), 29 U.S.C. 1104(a)(1)(A)	7
§ 404(a)(1)(B), 29 U.S.C. 1104(a)(1)(B)	7
§ 405(a)(1), 29 U.S.C. 1105(a)(1)	4
§ 406(b)(1), 29 U.S.C. 1106(b)(1)	7
§ 410(a), 29 U.S.C. 1110(a)	7
§ 502(a)(3), 29 U.S.C. 1132(a)(3)	1, 2, 4, 7
§ 502(a)(5), 29 U.S.C. 1132(a)(5) (1988 & Supp. V 1993)	1, 2, 3, 5, 6, 7
§ 502(*l*), 29 U.S.C. 1132(*l*) (Supp. V 1993)	3, 4
§ 502(*l*)(1)(A), 29 U.S.C. 1132(*l*)(1)(A) (Supp. V 1993)	4
§ 502(*l*)(1)(B), 29 U.S.C. 1132(*l*)(1)(B) (Supp. V 1993)	4
Fed. R. Civ. P. 15(a)	8
Miscellaneous:	
G. Bogert & G. Bogert, *The Law of Trusts and Trustees* (rev. 2d ed. 1982)	2
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Miscellaneous—Continued: Page

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1094

ROBERT B. REICH, SECRETARY OF LABOR, PETITIONER

v.

CONTINENTAL CASUALTY COMPANY
AND
AMERICAN CASUALTY COMPANY OF READING,
PENNSYLVANIA, MEMBERS OF THE CNA INSURANCE
COMPANIES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents contend (Br. in Opp. 9-10) that the Secretary's arguments for interpreting Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5) (1988 & Supp. V 1993), to authorize relief against nonfiduciaries were fully briefed in *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993), and were rejected by the Court in the course of its ruling precluding money damages under Section 502(a)(3), 29 U.S.C. 1132(a)(3). Respondents are mistaken.

a. As the Court noted in *Mertens*, the application of Section 502(a)(3) to nonfiduciaries was contested only by amici

supporting the respondent, 113 S. Ct. at 2067,[1] and for that reason the Court expressly reserved decision on the issue, *id.* at 2067-2068.

b. In *Mertens*, the Court rejected the notion that Section 502(a)(3)'s authorization of "appropriate equitable relief" includes "whatever relief a court of equity is empowered to provide"; the Court held instead that the phrase takes in only "those categories of relief that were *typically* available in equity." 113 S. Ct. at 2068-2069. Although restitution is available at law (through quasi contract), Pet. App. 3a-4a; E. Shoben & Wm. Tabb, *Cases and Problems on Remedies* 711 (1989), it is also a core concept in equity (employed principally through the remedy of constructive trust), *ibid.*; Restatement of Restitution § 160, at 640, Introductory Note 9 (1937); J. Dawson, *Unjust Enrichment* 26 (1951); *Stauffer* v. *Stauffer*, 351 A.2d 236, 241 (Pa. 1976) (constructive trust "is an equitable remedy designed to prevent unjust enrichment").

The specific remedy sought by the Secretary in this case—restitution against nonfiduciary knowing participants—is "equitable relief" under the definition adopted in *Mertens*, because it is a remedy that was typically provided at common law through the equitable doctrine of constructive trust. See Restatement of Restitution, *supra*, § 160, at 640; *id.* § 168 cmt. a, at 684; 4 A. Scott & W. Fratcher, *The Law of Trusts* § 291, at 77-78 (4th ed. 1988); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 868, at 79, 84-85 (rev. 2d ed. 1982); 2 Restatement (Second) of Trusts §§ 288, 291 cmt. a, at 58 (1959). As the court of appeals concluded, restitution is "an equitable

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[1] The respondent in *Mertens* conceded that Sections 502(a)(3) and (a)(5) "authorize the award of equitable relief against *non-fiduciaries*, including those forms of relief, like restitution, that involve the transfer of money." Brief for Respondent at 40, *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993) (No. 91-1671) [hereinafter *Mertens* Resp. Br.].

remedy in a sense in which damages, though *occasionally* awarded in equity cases, are not." Pet. App. 5a.

c. *Mertens* did not address definitively the Secre-tary's argument that the text of Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*) (Supp. V 1993), presumes the avail-ability of relief against nonfiduciaries under Section 502(a)(5). The Court did reject the notion that Section 502(*l*) presumes the availability of *money damages* as an aspect of the "equitable relief" available under Section 502(a)(5). The Court reasoned that Section 502(*l*) (which bases the amount of the civil penalties it prescribes on the amount awarded against the defendant in a civil proceeding brought by the Secretary under Section 502(a)(5)) would retain meaning and scope in the absence of a cause of action for money damages so long as Section 502(a)(5) is interpreted to authorize a suit for "restitution of ill-gotten plan assets." 113 S. Ct. at 2071. The Court further observed that Section 502(*l*) would have meaning and scope "even assuming non-fiduciaries are not liable at all for knowing participation in a fiduciary's breach of duty, see *supra*, at 2067-2068, [because] cofiduciaries expressly are, see § 405(a), so there are some 'other person[s]' than fiduciaries-in-breach liable under § 502(*l*)(1)(B)." 113 S. Ct. at 2071. That interpretation was not, however, urged by the respondent.[2] Nor was it actually adopted by the Court, which made clear that it was merely "assuming" for purposes of discussion that nonfiduciaries are not liable at all under Section 502(a)(5), and referred expressly to the prior portion of the opinion (113 S. Ct. at 2067-2068) in which it had reserved judgment on that question.

[2] To the contrary, the respondent in *Mertens* affirmatively suggested that Section 502(*l*)'s reference to the "applicable recovery amount" could mean "[t]he amount of money a non-fiduciary is required to disgorge by a restitution award under § 502(a)(5)." *Mertens* Resp. Br. 40.

There are, moreover, two important factors not mentioned by the Court in *Mertens* that weigh heavily against a circumscribed reading of Section 502(*l*)'s reference to "other person." First, as we demonstrate in the certiorari petition (at 17), it is unlikely that Congress would have used the term "other person" if it had meant to restrict the scope of the civil penalty provision to cofiduciaries, since the terms "person" and "fiduciary" are separately defined in ERISA and the former is far broader than the latter. Compare 29 U.S.C. 1002(9) ("person") with 29 U.S.C. 1002(21) ("fiduciary"). Second, because Section 502(*l*)(1)(A) specifically authorizes civil penalties against fiduciaries—and because knowing participation by one fiduciary in a breach by another constitutes a breach of the former's own fiduciary duty, see 29 U.S.C. 1105(a)(1)—an interpretation of Section 502(*l*)(1)(B) that reached only fiduciaries and co-fiduciaries would render superfluous Congress's authorization of civil penalties for "knowing participation * * * by any other person."

d. The Court held in *Mertens* that Section 502(a)(3) does not authorize a suit for money damages, notwithstanding that money damages were available against nonfiduciaries at common law. In so holding, the Court did not disavow the interpretive significance of Congress's desire through ERISA to afford beneficiaries greater protection than was afforded them under the common law. See *Mertens*, 113 S. Ct. at 2071, quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983), and citing *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 114 (1989). Rather, it concluded that arguments from the "basic purpose" of ERISA could not "overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 113 S. Ct. at 2071. In this case, we are not asking the Court to elevate the Act's "basic purpose" over its text; rather, we submit, the most natural reading of the text (that "equitable relief" includes the traditional equitable remedy of restitution against a knowing participant

in a breach of trust) is promotive of Congress's intention to protect the inter-ests of plan participants and beneficiaries.

2. Respondents argue (Br. in Opp. 10) that the absence of a distinct statutory duty under ERISA to avoid knowing participation in a fiduciary breach precludes reading Section 502(a)(5) to authorize restitution against nonfiduciary knowing participants. They rely on the Court's statement in *Mertens* that trust beneficiaries had a common law remedy against nonfiduciaries "because nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach." *Mertens*, 113 S. Ct. at 2068 n.5. The Court's apparent assumption respecting the common law, however, was incorrect. At common law, equitable restitution was not justified on the ground that the nonfiduciary had violated an independent duty. See 1 D. Dobbs, *Law of Remedies* § 4.3(2), at 597 (2d ed. 1993) (the remedy "is in no way limited to cases of wrongdoing"). Instead, the non-fiduciary's liability was a derivative of the trustee's breach of his fiduciary duties. Under the doctrine of constructive trust, "[w]here a person holding property in which another has a beneficial interest transfers title to the property in violation of his duty to the other, the transferee holds the property subject to the interest of the other, unless he is a bona fide purchaser." Restatement of Restitution, *supra*, § 168(1), at 684. In other words, a knowing transferee is treated as "[a] purchaser[] with notice, and thus as [a] mere trustee[] of the parties, who are entitled to the assets." 2 J. Story, *Commentaries on Equity Jurisprudence* § 1257, at 606 (photo. reprint 1988) (13th ed. 1886); see *id.* § 1258, at 607 ("An abuse of a trust can confer no rights on the party abusing it, or on those who claim in privity with him."). Because recovery at common law was not premised on the nonfiduciary's own breach of a legal duty, the absence of a statutory duty imposed on nonfiduciaries does not foreclose suits against nonfiduciaries to recover their unjust enrichment.

3. Respondents argue (Br. in Opp. 11) that no further review of the question presented is warranted because this Court relied on *Mertens*' discussion of that question in its subsequent decision in *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439 (1994). In *Central Bank*, the Court adverted to the *Mertens* dictum to support the principle that the existence of a cause of action at common law provides no basis for grafting that cause of action onto an Act of Congress that does not itself provide such a cause of action. *Central Bank*, 114 S. Ct. at 1447. That principle, however, is inapposite in this case, because we do not argue that the Court should create a cause of action by implication. Instead, we argue that because the statutory phrase "appropriate equitable relief" is not self-defining, the scope of the express cause of action under Section 502(a)(5) should—consistent with standard interpretive practice—be determined with reference to the scope of "equitable relief" afforded under similar circumstances at common law. See, *e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 111-115.

4. Respondents suggest (Br. in Opp. 12) that review would be premature because there is no post-*Mertens* conflict on the question presented. As we explain in the certiorari petition (at 12), postponing review might be appropriate if the courts of appeals were analyzing the question independently, or reexamining their views on the question in light of the actual holding in *Mertens* with respect to the availability of money damages. That is not what is happening. Instead, the courts of appeals—which had previously interpreted Section 502(a)(5) as providing a cause of action against nonfiduciaries—are now barring such suits because they feel constrained to do so by *Mertens*' discussion regarding that distinct "antecedent question," even though the Court in *Mertens* expressly "reserved decision" on that question. 113 S. Ct. at 2068; see Pet. 11-13.

Because the question presented in this case was not fully briefed in *Mertens*, and was not subject to plenary review, the Court did not consider several textual and contextual factors that argue strongly in favor of interpreting Section 502(a)(5) as creating a cause of action against nonfiduciaries. Unless the Court considers the issue on its merits, the lower courts will likely continue to reject that cause of action out of hand.

5. Respondents contend (Br. in Opp. 12-14) that they did not knowingly participate in the trustees' breach of their fiduciary duties, and that they have been sued in this case merely for charging a premium that the Secretary deems to have been excessive. That is not correct. The Secretary contends that the trustees used $970,000 of plan assets to indemnify themselves against $1 million of liability, in violation of 29 U.S.C. 1110(a), 1104(a)(1)(A) and (B), and 1106(b)(1); that respondents knew that providing a $1 million policy for a $970,000 premium protected the trustees but entailed no benefit to the Plans; and that respondents agreed to provide that policy in order both to reduce their own expected losses on the Plans' prior policies and to avoid the possibility that, as a result of the trustees' lawsuit against respondents, they would be forced to reinstate the preexisting $20 million coverage. Compl. ¶¶ 11-13 (A.12); A. 57-58, 61-62; S.A. 12-24.[3] Respondents' factual culpability has yet to be tried, but the nature of the facts alleged renders this case entirely suitable as a vehicle for review of the legal question presented.

6. Contrary to respondents' contention (Br. in Opp. 14-17), there is no question that the Secretary is seeking restitution. Although he initially sought monetary damages, the

[3] There is no merit to respondents' assertion (Br. in Opp. 13-14) that the Secretary seeks to hold them liable on a theory of constructive knowledge. The Secretary contends in this case that respondents were well aware of all of the material facts respecting the trustees' wrongful actions. S.A. 15-18.

Secretary acknowledged after *Mertens* that damages were no longer available, and he made clear in his post-*Mertens* brief to the district court that the government is now seeking to recover only the amount by which respondents were unjustly enriched through their participation in the trustees' breach. See S.A. 11-12, 18-24.[4] Restitution is civil liability based on unjust enrichment. Pet. App. 6a; Shoben & Tabb, *supra*, at 711.

Respondents take pains to emphasize (Br. in Opp. 15) that they made no profit on the transaction at issue. It is irrelevant, however, whether respondents were unjustly enriched by making a profit or (as the Secretary contends) by minimizing the amount of their coverage losses. As the court of appeals recognized, there is no conceptual difference between unjust profit and unjust avoidance of loss, Pet. App. 6a, and the law has had no difficulty recognizing that the latter is equally a basis for restitution. See Restatement of Restitution, *supra*, § 1 cmt. b, at 12.[5]

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[4] In his post-*Mertens* brief to the district court, the Secretary expressed his willingness "to amend his proposed conclusions of law consistent with *Mertens*' limitations on the available remedies." S.A. 19 n.2. Although the district court did not respond to that offer—because it concluded that ERISA provides no remedies at all against nonfiduciaries—the court gave no indication that it was troubled by the absence of a formal motion to amend, cf. 6 C. Miller, *Cyclopedia of Federal Procedure* § 18.04, at 174 (3d ed. rev. 1988) ("There is recognized room for elasticity of practice in regard to amendments."), and it clearly had the authority—if the case had gone forward—to permit such amendment, see Fed. R. Civ. P. 15(a); *Foman* v. *Davis*, 371 U.S. 178, 182 (1962); see also 3 J. Wm. Moore & R. Freer, *Moore's Federal Practice* ¶ 15.08[2], at 15-53 to 15-54 (2d ed. 1994) (courts permit amendment to change a claim sounding in contract to one for reformation in equity).

[5] Contrary to respondents' assertion (Br. in Opp. 9 n.4) the court of appeals unmistakenly held that the Secretary has stated a claim for restitution (Pet. App. 5a-6a):

It is also irrelevant for present purposes whether the amount of unjust enrichment on the Secretary's underlying claim should be calculated by looking to the market value of Endorsement No. 7 at the time it was extended or, instead, to the amount of loss respondents were ultimately able to avoid. If, as respondents contend (Br. in Opp. 16-17), the Secretary should base his prayer for relief on the difference between $970,000 and the amount by which the value of Endorsement No. 7 exceeded that of the policy it replaced, the Secretary's claim can readily be adjusted on remand.[6] Regardless of how that issue is resolved, it has no bearing on the resolution of the threshold question, presented in the certiorari petition, of whether the Secretary has a cause of action against respondents at all.[7]

> But *was* the Department of Labor seeking restitution? * * * [W]hat the Department was really seeking, and what the concept of unjust enrichment and its remedial corollary restitution do encompass, was to recover a "negative unjust enrichment," consisting of the unjust avoidance of a loss.

[6] Respondents err in asserting (Br. in Opp. 15-16) that the Secretary acted inequitably by filing suit after respondents had covered the claims that arose under Endorsement No. 7. First, respondents were on notice when they paid those claims that the Secretary might bring suit against them based on the Plans' insurance policies. The agreement by which the trustees settled the suit in *Brock* v. *Hanley*, Civ. LV No. 86-421 LDG (D. Nev.), provided expressly that nothing in that settlement would preclude later claims by the Secretary based on the Plans' transactions with its insurance companies. A. 192. Second, respondents were legally obligated to cover the claims that fell within Endorsement 7. To the extent that respondents can demonstrate that the payments they made under Endorsement No. 7 exceeded those for which they would have been responsible under the Plans' prior policy, that showing will be relevant, if at all, in determining the amount by which respondents were unjustly enriched.

[7] Finally, respondents are also mistaken in their contention (Br. in Opp. 15), which is equally irrelevant for present purposes, that the Secretary's

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1995

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claim cannot be one for restitution because the Secretary has not sought to have Endorsement No. 7 rescinded. "The requirement of restoration or tender is a requirement when the plaintiff's claim is the kind which, for shorthand, is said to be 'at law.' Such a requirement is not imposed when the plaintiff's suit is 'in equity.'" 1 Dobbs, *supra*, § 4.8, at 673.